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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 377.

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

THE CITY OF PORTLAND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON.

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1 In the Circuit Court of the United States for the District of Oregon.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff,
vs.
CITY OF PORTLAND, a Municipal Corporation, Defendant.

UNITED STATES OF AMERICA, ss:

The President of the United States to the City of Portland, Multnomah County, Oregon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., within sixty days from the date of this writ, pursuant to an appeal duly allowed by the Circuit Court of the United States for the District of Oregon, in a cause wherein Southern Pacific Company is appellant and City of Portland is appellee, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States Supreme Court, this 18th day of April, A. D. 1910.

R. S. BEAN, Judge.

PORTLAND, ORE., April 18th, 1910.

Service of a copy of the within citation is hereby admitted and acknowledged to have been made this 18th day of April, 1910.

J. P. KAVANAUGH &
WM. C. BENBOW,
Attorneys for Appellee City of Portland.

2 DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within citation is hereby accepted in Multnomah County, Oregon, this — day of April, 1910, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, of Attorneys for plaintiff.

Attorney for Defendant.

[Endorsed:] No. 3407. In the Circuit Court, of the United States, for the District of Oregon. Southern Pacific Company, a corporation, plaintiff, vs. City of Portland, a municipal corporation, defendant. Citation. R. A. Leiter, Ben C. Dey, W. D. Fenton, James E. Fenton, Attorneys for plaintiff. U. S. Circuit Court, District of Oregon. Filed Apr. 19, 1910. G. H. Marsh, Clerk.

- 3 In the Circuit Court of the United States for the District of Oregon, October Term, 1908.

Be it remembered, That on the 30th day of November, 1908, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

- 4 In the Circuit Court of the United States for the District of Oregon.

SOUTHERN PACIFIC COMPANY, Complainant,

vs.

CITY OF PORTLAND, a Municipal Corporation, Defendant.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the District of Oregon:

The Southern Pacific Company, a corporation organized under and pursuant to the laws of the state of Kentucky, and a citizen of said state, having an office and place of business in the City of Portland, County of Multnomah and State of Oregon, brings this, its bill of complaint, against the City of Portland, a municipal corporation and political subdivision of the State of Oregon, organized and existing under the laws of the State of Oregon and a citizen of said State of Oregon, and thereupon your orator for cause of suit against said defendant, alleges the following facts, to-wit:

I.

That the complainant, Southern Pacific Company, is and during all the times hereinafter named, has been a corporation duly organized and incorporated under the laws of the State of Kentucky and a citizen of said state, but having an office and place of business at Portland in the State of Oregon, and duly authorized by law to transact business in the State of Oregon, and duly incorporated for the purpose of constructing and operating railroads in the United States and in the State of Oregon, and as such authorized to accept and receive leases of lines of railroad companies owning railroads in the State of Oregon and incorporated under the laws of the State of Oregon, and as such engaged in the business of common carrier of passengers and freight for hire over its lines of railways in the states of Oregon, California and other states and territories of the United States, and as such engaged in operating, under lease from the Oregon and California Railroad Company, that certain line of railroad from its depot and station in the yards of the Northern Pacific Terminal Company at the north end of Fourth Street in the City of Portland, by way of Fourth Street south-

erly to Sheridan Street, thence southerly to the south boundary line of said city, and thence by way of Beaverton, Hillsboro and Forest Grove to a point at or near McMinnville, thence to Corvallis, Oregon, a distance of 96.5 miles.

II.

That the defendant, City of Portland, is now and during all the times hereinafter named, and ever since its incorporation on the — day of January, 1851, has been a municipal corporation and political subdivision of the State of Oregon, organized and existing under the laws of said state; and that said Fourth Street is, up to said Sheridan Street, and during all the times hereinafter named, has been a public street within said City of Portland, and that the said City of Portland, during all the times hereinafter named has been and now is a citizen of the State of Oregon, and as such claims to have jurisdiction over the streets of said city, including said Fourth Street.

III.

That the matter and amount in dispute in this suit exclusive of interest and costs, exceeds the sum of Two Thousand Dollars.

IV.

That the Oregon Central Railroad Company during all the times hereinafter named, has been and until the 20th day of January, 1906, was a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business at Portland in such state, and as such was authorized to construct, operate and maintain the railroad from the said City of Portland, southern, and in aid thereof the Congress of the United States, on May 4, 1870, by an act entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," granted to said Oregon Central Railroad Company, its successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and otherwise provided that whenever and as often as the said company should complete and equip twenty or more consecutive miles of said railroad and telegraph, the Secretary of the Interior should cause the same to be examined at the expense of the company by three commissioners appointed by him, and if they should report that such completed section is a first class railroad and telegraph, properly equipped and ready for use, he should cause patent to be issued to said company for so much of said granted lands specified in said Act of Congress as should be adjacent to and coterminus with the said completed sections, and by which said Act of Congress it was further provided that the said company should file with the Secretary of the Interior its assent to said Act within one year from the time of its passage, and whereby it was further provided that such grant was upon said condition that said company should complete a section of twenty or more miles of said railroad and telegraph

within two years, and the entire railroad and telegraph within six years from said date.

That thereafter and within the time provided by said Act of Congress, said company filed with the Secretary of the Interior its assent to said Act, within one year from May 4, 1870, and completed a section of twenty or more miles of said railroad and telegraph within two years from said date, and the entire railroad, from Portland to the Yamhill River at or near McMinnville, in the

7 State of Oregon, within six years from said May 4th, 1870, and as a part of said road completed and equipped the first twenty miles thereof beginning at a point at the north end of Fourth Street at its intersection of North Front Street in the depot and station grounds of said company, now within the yards of the Northern Pacific Terminal Company, and so completed and constructed the same under said Act of Congress, and under and pursuant to that certain ordinance of the City of Portland, No. 599, approved Jan. 6, 1869, hereinafter set out, by way of Fourth Street, to Sheridan Street, and thence southerly over its own right of way acquired by purchase and condemnation, and under said Act of Congress, southerly to a point at or near Hillsboro, Oregon, on or before the 3rd day of January, 1872, and that the Oregon Central Railroad Company aforesaid, operated said line of railroad from said point at said north end of Fourth Street, by way of Forest Grove, to the Yamhill River near McMinnville, Oregon, until on or about the 6th day of October, 1880.

That on the 6th day of January, 1869, the defendant, City of Portland, under and by virtue of the laws of the State of Oregon, and its charter then in effect, duly passed and the same was duly approved by the Mayor, Ordinance No. 599, in words and figures as follows, to-wit:

"An Ordinance Authorizing the Oregon Central Railroad Company, of Portland, to Lay a Railroad Track and Run Cars Over the Same, Within the City of Portland.

The City of Portland does ordain as follows:

Franchise-Route.

SECTION 1. The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland, to the north side of "G" Street, and as much farther north as said Fourth Street may extend or be extended, upon the terms and conditions as hereinafter provided.

Grade and Repairs.

SECTION 2. The said railroad company shall grade to established grades, construct and maintain in good repair said street, at least six feet in width upon each side of the center line of said street, and as much wider as may be affected by said

railway or the construction thereof, and shall do and perform said work and the improvement and the repair thereof in such manner and as often as the Common Council of the City of Portland may at any time provide for or require.

SECTION 3. The Common Council reserve the right to make or to alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary.

SECTION 4. All alteration of grades or streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of the said railroad company, and the same shall be made as may be provided by ordinance.

SECTION 5. It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance, the forfeiture of the same, and to cause the said rails to be removed from said street.

Approved Jan. 6th, 1869.

The said ordinance was then and there duly accepted by the Oregon Central Railroad Company therein designated, and the said Oregon Central Railroad Company, its successors and assigns, including the complainant, Southern Pacific Company, as lessee of said property and in the possession and operation of the same, have at all times fully complied with the terms and conditions of said ordinance, and the said Oregon Central Railroad Company, its successors and assigns, have expended, upon the faith of said ordinance, in the construction of said road and in improvements ordered and directed by the said City of Portland, and in the renewal
9 of said road from the north end of said Fourth Street aforesaid, to Sheridan Street, in said city, a sum in excess of \$133,483, and the said Southern Pacific Company, ever since the lease of said property by the Oregon and California Railroad Company as hereinafter described, has continuously operated and maintained said railroad on said Fourth Street as required by said ordinance, and as required by the business of said railroad company in operating said railroad from Portland to Corvallis and return.

V.

That on January 6th, 1869, when said ordinance No. 599 was passed and approved, as aforesaid, the charter of the City of Portland then in effect was the Act of the Legislative Assembly, of October 14th, 1864, found at pages three to thirty-one of the Session Laws for that year.

That on October 14th, 1862, the Legislative Assembly of the State of Oregon duly passed, and the same was approved by the

Governor, an act entitled, "An Act providing for private incorporations and the appropriation of private property therefor," which act had been prepared and reported by the Code Commission composed of M. P. Deady, A. C. Gibbs and J. K. Kelly, and the same was enacted into law as aforesaid, at the second regular session of the Legislative Assembly of said state, and took effect immediately upon its approval. Section 24 of said Act, now Section 5077 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, was and is as follows:

"SECTION 5077. Public Grounds, Streets, etc., May be appropriated.

When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley, or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road."

Section 25 of said Act of October 14th, 1862, now Section 5078 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon, was and is now as follows:

"SECTION 5078. Streets, etc., in Corporate Towns, Proceedings to Appropriate.

Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, or alley, or public grounds, within such town as the local authorities mentioned in the last section and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

That said Act of October 14th, 1862, aforesaid, took effect pursuant to Section 51 thereof, which is as follows:

"Owing to the necessity of certain corporations being formed under this Act immediately, so as to commence operations before the winter rains set in, this act shall take effect and be in force from and after its approval by the Governor."

VI.

That the Oregon and California Railroad Company was duly incorporated under the laws of the State of Oregon on the 16th day of March, 1870, and as such ever since has been and now is a corporation duly organized and existing under the laws of the State of Oregon, having its office and principal place of business at Portland in said state, and as such authorized to construct, operate, acquire, own,

hold, use and lease its railroads and other property and franchises owned by it in the State of Oregon, and that on the 6th day of October, 1880, the Oregon Central Railroad Company, aforesaid, being thereunto duly authorized, duly sold, assigned, transferred and conveyed to the Oregon and California Railroad Company thereunto duly authorized to accept and receive the same, all the property of the Oregon Central Railroad Company, including its line of railroad then constructed extending from Portland, Oregon, to St. Joseph, Oregon, a point on the Yamhill River at or near McMinnville, in the State of Oregon, together with its rights and franchises, including the said franchise granted under said Act of Congress, and including the said franchise granted to said Oregon Central Railroad Company under Ordinance No. 599 aforesaid, and including said railroad track on said Fourth Street; and the said Oregon and California Railroad Company ever since October 6th, 1880, and up to the 1st day of July, 1887, continuously operated and maintained said railroad and tracks, commencing at the north end of said Fourth

Street, as aforesaid, thence on Fourth Street to Sheridan Street, thence southerly to Corvallis by way of Forest Grove and McMinnville, as aforesaid, and the said City of Portland, during all said times, recognized the said Oregon and California Railroad Company and the said Southern Pacific Company under its lease heretofore mentioned, as rightfully in the possession of said franchise on said Fourth Street, and as obligated to perform the conditions of said Ordinance No. 599, and as entitled to the benefits and burdens of the franchise thereby granted, and so continued to recognize said rights and to impose said burdens until on or about the passage of that certain pretended ordinance hereinafter set out, being Ordinance 16491, entitled, "An Ordinance prohibiting the operation of steam locomotives and freight cars on Fourth Street between Glisan Street and the southerly limits of the City of Portland after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof," and which said ordinance was passed May 1st, 1907.

VII.

That on the first day of July, 1887, the Oregon and California Railroad Company, for and in consideration of the covenants of said lease specified, for value received, duly assigned, transferred, and leased to the complainant for the term of forty years from said first day of July, 1887, the lines of railroads of the Oregon and California Railroad Company in Oregon, including the line of railroad constructed, operated and maintained by the Oregon Central Railroad Company of Portland, Oregon, and the Oregon and California Railroad Company of Portland, Oregon, from its northerly terminus at the intersection of Fourth and North Front Streets, in the City of Portland, as aforesaid, along Fourth Street to Sheridan Street in said City, thence by way of Beaverton, Hillsboro, Forest Grove and McMinnville to Corvallis, together with all the rights and franchises granted to said Oregon Central Railroad Company under said Ordi-

12 nance No. 599, as aforesaid, and that the said Southern Pacific Company, complainant herein, thereupon entered into the open, notorious and exclusive possession of said railroad and franchises and rights granted under said Ordinance No. 599, and has ever since been and now is operating and maintaining as a common carrier for hire, and serving the people and business of the counties of Multnomah, Washington, Yamhill, Polk and Benton, in the State of Oregon, the said railroad between said points, over said Fourth Street, as aforesaid, and during all said times operating steam locomotives and cars over the same, and as required and authorized by law.

VIII.

That notwithstanding the passage of said Ordinance No. 599, as aforesaid, and the acceptance of the same by the said Oregon Central Railroad Company, its successors and assigns, and the operation of said railroad over said Fourth Street in accordance with the terms thereof, the Common Council of the City of Portland attempted to pass and did pass, on the first day of May, 1907, Ordinance No. 16491, in words and figures as follows:

"An Ordinance prohibiting the operation of steam locomotives and freight cars on Fourth Street between Glisan Street and the southerly limits of the City of Portland after eighteen — from the date of the passage of this ordinance, and providing a penalty for the violation thereof.

The City of Portland does ordain as follows:

SECTION 1. It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, or any other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after eighteen months from the final passage and approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.

SECTION 2. Any violation of the provisions of this ordinance by the owners, officers, agents or employes of said Oregon Central Railroad Company, or its successors, assigns, or lessees or any other person, firm or corporation, by so running or operating steam locomotives or freight cars (other than those excepted in section 1 hereof), or attempting to run or operate the same on said Fourth Street after the time mentioned in section 1 of this ordinance, shall be punishable by a fine of not less than \$250.00, nor more than \$500.00, or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotives or freight cars,

13 shall constitute a separate offense, and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.

SECTION 3. Said ordinance shall not be construed so as — recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway, or the use, operation, or running of any railway car or cars, motor or motors, locomotive or locomotives, or other railway vehicle or vehicles in, on, over, along or upon said Fourth Street heretofore, now or hereafter claimed, alleged or set up by any person, persons, firm or corporation."

That while said ordinance was pending, and on May first, 1907, the Oregon & California Railroad Company and Southern Pacific Company, protested to the Mayor and Common Council of the City of Portland, aforesaid, against the passage of said ordinance, and filed in the Auditor's office, on said date, and before the passage of said ordinance #16491, their written protest, in words and figures as follows:

To the Hon. Mayor and Common Council of the City of Portland:

The Oregon & California Railroad Company, and the Southern Pacific Company, lessee, as the successors in interest in possession of all the rights, franchises and privileges created and conferred by ordinance No. 599, passed and approved Jan. 6, 1869, granting to the Oregon Central Railroad Company certain rights on Fourth Street, in the City of Portland, to which rights reference is hereby made, do hereby respectfully protest against the passage of Ordinance #—, upon the following grounds, to-wit: that the said proposed ordinance is unreasonable and invalid, but particularly because it is not within the power of the Common Council to repeal, amend or modify said Ordinance No. 599.

OREGON & CALIFORNIA RAILROAD
CO.,

By J. P. O'BRIEN, *Its Second Vice President.*

SOUTHERN PACIFIC COMPANY,

By J. P. O'BRIEN, *General Manager.*

Dated May 1, 1907.

IX.

That on the 16th day of November, 1908, the said City of Portland, acting by and through its City Attorney, J. P. Kavanaugh, and its Chief of Police, C. Gritzmacher, caused to be filed in the Municipal Court of the City of Portland, County of Multnomah, State of Oregon, and before the Municipal Judge thereof, a complaint, in words and figures as follows, to-wit:

- 14 In the Municipal Court of the City of Portland, County of Multnomah, State of Oregon, before the Municipal Judge.

THE CITY OF PORTLAND, Plaintiff,

VS.

THE SOUTHERN PACIFIC COMPANY, a Corporation, and JAMES P. O'BRIEN, Defendants.

The defendants, the Southern Pacific Company, and James P. O'Brien, are accused by this complaint, of violating Ordinance No. 16491, of the City of Portland, Multnomah County, State of Oregon, entitled, "An Ordinance prohibiting the operation of steam locomotives and freight cars on Fourth Street between Glisan Street and the southerly limits of the City of Portland, after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof", which ordinance passed the Council of the said city May 1st, 1907, was submitted to the Mayor of said City May 2nd, 1907, and not being signed nor vetoed by the said Mayor within the time limited by law therefor, became a law on May 13th, 1907, without the signature of said Mayor, the said offense being committed as follows:

During all the times hereafter mentioned, the defendant, the Southern Pacific Company, was and is a corporation, duly organized and existing, and being engaged in business as a common carrier of freight and passengers, and maintaining an office and a place of business in said City of Portland; and the defendant, James P. O'Brien, during all the times hereinafter mentioned, was and is an officer of said corporation, and in charge of the business and affairs of said corporation in the State of Oregon, and in the City of Portland, as General Manager thereof; and on the 16th day of November, 1908, in the city aforesaid, the said corporation and the said James P. O'Brien, as such officer and manager of said corporation, did willfully and unlawfully run and operate steam railway locomotives upon and along Fourth Street, between the south boundary line of said city, and the south line of Glisan Street in said city of Portland, and within the corporate limits of said City of Portland, whereby the peace and quiet and dignity of said city was disturbed, contrary to the ordinance in such case made and provided.

Dated at Portland, Oregon, this 16th day of November, 1908.

J. P. KAVAVAUGH,

City Attorney,

By H. M. TOMLINSON AND

FRANK S. GRAND,

Deputies.

STATE OF OREGON,

County of Multnomah, City of Portland, ss:

I, C. Gritzmacher, having been first duly sworn, say that the foregoing complaint is true, as I verily believe.

C. GRITZMACHER.

Subscribed and sworn to before me this 16th day of November, 1908.

J. T. MILNER,
Clerk of Municipal Court.

And that thereupon said Municipal Judge caused to be issued a warrant for the arrest of the said James P. O'Brien, who then and there was and is now General Manager of said complainant, Southern Pacific Company, Lines in Oregon, and on said date, based upon said complaint, a warrant issued thereon and not otherwise, and said C. Gritzmacher, acting thereunder as Chief of Police, acting by and through one of his subordinates, caused the said James P. O'Brien to be arrested and placed in custody, and that thereupon and thereafter the said James P. O'Brien appeared in said cause in said Court in person as well as by his counsel, and was allowed to go upon his own recognizance, and said cause was continued for further hearing, and the same is now pending in the said Municipal Court, and that the said City of Portland, acting by and through its Mayor and Chief of Police, threatens to and will, unless restrained by this Honorable Court, cause to be filed other complaints charging the said Southern Pacific Company and the said James P. O'Brien with the pretended

violation of said Ordinance #16491, of the same tenor and
16 effect as complaint hereinbefore set out, and will, unless restrained by this Court, annoy, vex and harass the complainant and said James P. O'Brien, with a multiplicity of criminal actions for the pretended violation of the said pretended ordinance, thereby intending to and trying to prevent the operation of the trains of the said Southern Pacific Company, and particularly its motive power used in the operation thereof, to-wit, the steam engines over and upon and along said Fourth Street in said City of Portland, and all freight trains or cars.

X.

That heretofore the Legislative Assembly of the State — Oregon duly enacted an act to incorporate the City of Portland, approved January 23rd, 1903, and the said City of Portland ever since has been and is now acting under the terms and provisions of said Act, and is demanding that the said Southern Pacific Company discontinue the operation of its said trains under said Ordinance No. 599, as aforesaid, and accept and receive from said City of Portland, under said charter, an ordinance for a limited term by which said Southern Pacific Company may be permitted to operate and move street cars and other passenger cars on and over said Fourth Street by means of electrical power, and not otherwise, and for which it shall pay an annual revenue to the City of Portland for said franchise, which said sum so to be paid is required to be exacted by said charter as special revenue, and not as a license or privilege tax, but that under said proposed ordinance said Southern Pacific Company would not be permitted to operate its railroad trains and move its freight over its line of railroad from Corvallis to the northerly end of said Fourth Street, and along Fourth Street, or to operate any trains on said

Fourth Street moved by steam engines, nor to move any freight thereon whatsoever.

XI.

That in and by said charter of said City of Portland so enacted by the Legislative Assembly of the State of Oregon, approved
17 January 23rd, 1903, it is provided as follows:

"The Council has power and authority by ordinance, duly passed, to agree with any corporation, firm, or person constructing a commercial railroad and desiring to enter the city, upon the extent, terms and conditions upon which the streets, alleys or public grounds of the city may be appropriated, used or occupied by such railroad, and upon the manner, terms and conditions under which the cars and locomotive of such railroad may be run over and upon such streets, alleys, and public grounds; such agreement shall be subject to the provisions and requirements of Section 95, 97, 100 and 101 of this charter. No exclusive right for the aforesaid purposes shall be granted to any corporation, firm, or person, and the use of all such rights shall at all times be subject to regulation by the Council. In addition to the other requirements of this charter every ordinance granting such right shall be upon the condition that such grantee shall allow any other railroad company to use, in common with, the same track or tracks upon obtaining the consent of the Council, expressed by ordinance, each paying an equitable and proper portion for the construction and repair of the tracks and appurtenances used by such railroad companies jointly," and that there is no other provision in said charter under or by which a commercial railroad can acquire the right to construct and operate a railroad upon the streets, alleys or public grounds of said city, and if said ordinance No. 16491 is enforced and enforceable, it will be impossible for the said Southern Pacific Company to operate any railroad from the intersection of Sheridan Street with said Fourth Street in said City of Portland, to its station and terminals at the intersection of Fourth Street with North Front Street in said city, as aforesaid, and said Southern Pacific Company will be compelled to discontinue the operation of said trains into said City of Portland, and thereby cause great and irreparable damage to its business and to the public.

That said Southern Pacific Company has not, nor is it possible to obtain or provide any terminal, station, or siding at any point within the City of Portland, along the line of its said railway, or accessible thereto, from the intersection of Sheridan Street with Fourth Street, to the south boundary limits of said City of Portland, and that the trains of said Southern Pacific Company, from Corvallis and all points between Portland and Corvallis, could not be operated or brought into said City of Portland, or its business as a common carrier conducted if said Ordinance No. 16491 is enforced or enforceable, excepting by construction of about 10.17 miles of railroad from Beaverton, via Oswego, across the Willamette River, to Willsburg, Oregon, at the estimated cost of \$911,314.37, and thence to the east end of the Steel Bridge across the Willamette River, owned by the Oregon Railroad and Navigation Company, and thence across said

river to the intersection of Fourth Street with North Front Street, by the northerly terminus of said railroad constructed by the Oregon Central Railroad Company.

18

XII.

That in and by an act to incorporate the City of Portland enacted by the twenty-second regular session of the Legislative Assembly, 1903, and approved January 23rd, 1903, it was provided by Section 106 thereof as follows:

"All franchises or privileges heretofore granted by the city, which are not in actual use or enjoyment, or which the grantees thereof have not in good faith commenced to exercise, are hereby declared forfeited and of no validity, unless said grantees or their assigns shall, within six months after this charter takes effect, in good faith, commence the exercise or enjoyment of such grant or franchise. Nothing in this charter shall affect the validity of any franchise, right, or privilege in actual use or enjoyment heretofore given or granted by any former or the present city of Portland, or by the City of East Portland, or by the City of Albina, and the same shall be and continue in force and effect as given or granted by said cities or either of them," and that at said time and when said charter took effect, the said Southern Pacific Company was then and there operating its line of railroad over said Fourth Street as aforesaid, under said Ordinance No. 599, and was in the enjoyment of the franchise thereby granted.

XIII.

That the said Oregon Central Railroad Company being thereunto duly authorized, on October 6th, 1880, so executed said deed to said Oregon & California Railroad Company in consideration of the covenant and agreement upon the part of the Oregon and California Railroad Company, its successors and assigns, that they would pay or cause to be paid and discharged all lawful indebtedness of the said Oregon Central Railroad Company, which then exceeded the full value of the property conveyed, and which said indebtedness has been fully paid and discharged by the said Oregon & California Railroad Company; and the said conveyance was authorized by the unanimous vote of the stockholders and directors of said Oregon Central Railroad Company authorizing the dissolution of said Oregon Central Railroad Company, the settling of its business and disposing of its property, as provided by Sections 5068 and 5070, II Bellinger & Cotton's Annotated Codes and Statutes of Oregon, then in effect,

and that then and thereby, and by virtue of said conveyance
19 and said resolutions authorizing the dissolution of said Oregon Central Railroad Company, the said Oregon & California Railroad Company acquired all the property, franchises and rights of the Oregon Central Railroad Company, including its rights and franchises granted by said Ordinance No. 599, as aforesaid.

XIV.

That the Southern Pacific Company, in order to accomodate the public and transact its business as a common carrier, is required to

operate and is now operating over and along said Fourth Street, daily, ten regular passenger trains and two regular freight trains, and is moving both intra and inter-state commerce over and upon its said railroad tracks, and that the franchise and right to operate said railroad under said Ordinance No. 599, in accordance with the terms thereof, exceeds the value of Two Thousand Dollars, exclusive of interest and cost.

XV.

And your orator alleges and shows that the said Ordinance #16491 so pretended to be passed by said City of Portland, is void and of no force and effect, in this:

(a) That thereby the City of Portland would take property of the Southern Pacific Company without just or any compensation, and without the consent of the Southern Pacific Company, all in violation of Section 18, Article I, of the Constitution of the State of Oregon, which provides that, "Private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation; nor, except in case of the state, without such compensation first assessed and tendered."

(b) Said Ordinance #16491 is void and of no force and effect in this: that it violates Section 21, Article I of the Constitution of the State of Oregon, which provides, "No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution: Provided, that laws locating the capital of the state * * * may take effect or not, upon a vote of the electors interested."

(c) Said ordinance #16491 is void and of no force and effect in this: that it violates the Fourteenth Amendment to the Constitution of the United States, which provides among other things as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and said Ordinance is void particularly in this, that its enforcement will deprive the Southern Pacific Company and the Oregon & California Railroad Company of its property, to-wit, its rights under said Ordinance No. 599, and under the said Act of Congress of May 4, 1870, without due process of law, and is a denial to the Southern Pacific Company and the Oregon & California Railroad Company of the equal protection of the laws.

(d) Said Ordinance #16491 is void and of no force and effect in this: that it violates Article I, Section 8, paragraph 3, of the Constitution of the United States, which provides, "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of

Article I, Section 8 of the Constitution of the United States, which provides:

"The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," and particularly in this, that the enforcement of said ordinance by said City of Portland will interfere with, restrain and prevent the movement of interstate commerce, and is a burden upon said interstate commerce so being carried by said Southern Pacific

21 Company between Corvallis and said northerly terminus of said railroad at the intersection of Fourth Street and North Front Street, and to connection with other carriers doing business at said last named point, and impairs the rights granted by said Act of Congress of May 4th, 1870.

(e) Said Ordinance No. 16491 is void and of no force and effect in this, that it provides for excessive, unusual penalties fines and punishments, and thereby deprives the Southern Pacific Company and its officers and agents, and other citizens of the United States, of the equal protection of the law, and thereby takes the property of the complainant without due process of law.

(f) Said Ordinance No. 16491 is void and of no force and effect in this, that it violates Section 10, Article I, of the Constitution of the United States, which, among other things, provides, "No state shall pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts," and that the said ordinance attempts to and if enforced will impair the obligation of the contract created between the Oregon Central Railroad Company, its successors and assigns, and the said City of Portland, under said Ordinance No. 599, heretofore set out.

(g) The said Ordinance No. 16491 is void and of no force and effect in this, that it is unreasonable, arbitrary, and oppressive, and particularly in this, that although said railroad has been continuously operated over said Fourth Street as aforesaid, with steam locomotives, for thirty-nine years, there has never been any serious accident or injury caused to anyone thereby, and by reason of the physical location of the said City of Portland, and the location of the line of railroad under said Act of Congress of May 4th, 1870, and under the Articles of Incorporation of the Oregon Central Railroad Company, it was and is physically impossible to construct, locate or operate a line of railroad into the City of Portland from the south boundary thereof into the terminals and station of the said Southern

22 Pacific Company, now within the yards of the Northern Pacific Terminal Company, over or upon any other route, line or street other than said Fourth Street where the same has been so continuously operated and maintained.

XVI.

And your orator therefore alleges and shows that the said complaint so filed in said Municipal Court is void and without force or

effect, and that the said Court has no jurisdiction over the subject matter of said Complaint, or over the said complainant, or its officers or agents.

And your orator further shows that complainant has no plain, speedy or adequate remedy at law, and can have no adequate remedy except in this court, and that unless restrained the said City of Portland, acting by and through its Mayor and Chief of Police, and other officers, will attempt to enforce said Ordinance #16491, and will attempt to prosecute said complaint so filed in said Municipal Court as aforesaid, and will file other complaints of like tenor and effect, and will arrest or cause to be arrested the officers, agents and servants of said Southern Pacific Company, and will thereby prosecute or cause to be prosecuted divers and sundry criminal actions against this complainant and its officers and agents, to recover and impose the penalties, fines and imprisonment provided by said ordinance, and will subject complainant, its officers and agents, to a multiplicity of said actions in respect thereto.

Wherefore your orator brings this, its bill, and thereupon your orator prays:

First. That this Honorable Court will grant an order temporarily restraining said City of Portland, its Mayor, Chief of Police and Municipal Judge, and all its officers and agents, and each of them, from attempting to enforce said ordinance or prosecuting said complaint, or from attempting to arrest the officers, employees or agents of said complainant, or from taking any action, step, or proceeding against your orator or any of its officers, agents, or employees, to enforce any penalty, fine or imprisonment or remedy for any alleged violation by your orator of said pretended ordinance.

Second. That upon final hearing hereof a decree be entered perpetually enjoining the said City of Portland, its officers and agents, from attempting to enforce said ordinance, or to proceed with said cause in said Municipal Court, or to prosecute any action against this complainant or any of its officers, agents or servants, for any pretended violation of said ordinance, and that the said ordinance and the whole thereof be set aside and held for naught.

Third. That your orator may have such other and further relief in the premises as the nature and circumstances of the case may require, and to the Court may seem meet and equitable, and may it please your Honors to grant unto your orator a writ of injunction, conformable to the prayer of this bill, and also a writ of this Honorable Court to be directed to the said City of Portland, commanding it on a day certain therein to be named, and under a certain penalty, to be and appear before your Honorable Court and then and there full, true and perfect answer make to all and singular the premises (but not under oath, answer under oath being expressly hereby waived), and to stand and perform and abide such further orders, direction and decree therein as to your Honors shall seem meet, and

shall be agreeable to equity and good conscience, and your orator will ever pray.

SOUTHERN PACIFIC COMPANY,
By J. P. O'BRIEN,
General Manager Lines in Oregon.
BEN C. DEY,
R. A. LEITER, AND
WM. D. FENTON,
Solicitors for Complainant.

24 STATE OF OREGON,
County of Multnomah, ss:

I, J. P. O'Brien, being first duly sworn depose and say: that I am General Manager for the lines in Oregon of the complainant company, that I have read the foregoing bill of complaint, know the contents thereof, and that the same is in all respects true of my own knowledge, except as to matters and things which are therein stated upon information and belief, and as to those things, I believe the same to be true.

J. P. O'BRIEN.

Subscribed and sworn to before me this 21st day of November, 1908.

[SEAL.]

WM. D. FENTON,
Notary Public for Oregon.

Filed November 30, 1908. G. H. Marsh, Clerk Circuit Court of the United States for the District of Oregon.

25 And afterwards, to wit, on Monday, the 30th day of November 1908, the same being the 48th judicial day of the Regular October, 1908, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

26 *Return of Civil Process.*

UNITED STATES OF AMERICA,
District of Oregon, ss:

I hereby certify that on the 30 day of November, 1908, at Portland, Multnomah County, in said District I duly served the within Restraining Order upon the therein named The City of Portland, a Municipal Corp., by delivering to A. L. Barbur personally and in person as Auditor for said City of Portland a true copy of said Order in the within entitled Action duly certified to by the Clerk of the Circuit Court for said District.

CHARLES J. REED,
United States Marshal,
By CLYDE R. NICHOLSON, *Deputy.*

27 In the Circuit Court of the United States for the District of Oregon. .

SOUTHERN PACIFIC COMPANY, Complainant,
vs.
CITY OF PORTLAND, a Municipal Corporation, Defendant.

Order.

Upon reading the written, verified bill of complaint filed in the above entitled cause, it is ordered that the defendant shall show cause on the 28th day of December 1908, at 10 A. M. why a writ of injunction shall not issue as prayed for in said bill of complaint.

It is further ordered that meantime and until the further order of this Court, the defendant, City of Portland, its officers and particularly the Judge of the Municipal Court of the City of Portland, and its Chief of Police, and City Attorney, and each of them, be and they are hereby restrained from attempting to enforce the provisions of said Ordinance No. 16491, or any thereof, described in said bill of complaint, or from attempting to prosecute said action described in said bill of complaint, or any other action or procedure to enforce said ordinance, or any penalties for the alleged violation thereof.

It is further ordered that a copy of this order be served on the said City of Portland, as by law provided.

CHAS. E. WOLVERTON, *Judge.*

Dated November 30th, 1908.

Filed November 30, 1908. G. H. Marsh, Clerk of the U. S. Circuit Court for the District of Oregon.

28 And afterwards, to wit, on the 30th day of November, 1908, there was duly filed in said Court, a Bond on Restraining Order, in words and figures as follows, to wit:

29 In the Circuit Court of the United States for the District of Oregon.

SOUTHERN PACIFIC COMPANY, Complainant,
vs.
CITY OF PORTLAND, a Municipal Corporation, Defendant.

Know all men by these presents, that Southern Pacific Company, as principal, and R. Koehler, as surety, are held and firmly bound unto the City of Portland in the sum of Five Thousand Dollars, for the payment of which well and truly to be made and done they bind themselves, their heirs, executors, administrators and assigns, by these presents.

Sealed with their seals and dated this 21st day of November, 1908.

Now the condition of the above obligation is such that whereas Southern Pacific Company, a citizen of the State of Kentucky, having filed on the chancery side of the Circuit Court of the United State for the District of Oregon, a bill against the defendant above named, and having obtained an allowance of a temporary injunction, as prayed for in said bill, from said court,

Now, if the said Southern Pacific Company shall abide the decision of said Court, and pay all moneys and costs which shall be adjudged against it in case the said injunction shall be dissolved, then these presents shall be void, otherwise to remain in full force.

SOUTHERN PACIFIC COMPANY,

By J. P. O'BRIEN,

General Manager Lines in Oregon.

R. KOEHLER.

[SEAL.]

30 UNITED STATES OF AMERICA,

District of Oregon, County of Multnomah, ss:

I, R. Koehler, being first duly sworn depose and say: that I am resident of said district, and that after paying my just debts and liabilities I am worth the sum of Five Thousand Dollars in real estate within the jurisdiction of this Court, and subject to execution, levy and sale.

R. KOEHLER.

Subscribed and sworn to before me this 21st day of November, 1908.

[SEAL.]

WM. D. FENTON,
Notary Public for Oregon.

The within bond is hereby approved November 30th, 1908.

CHAS. E. WOLVERTON, *Judge.*

Filed Nov. 30, 1908. G. H. Marsh, Clerk of the U. S. Circuit Court for the District of Oregon.

31 And afterwards, to wit, on the 31st day of March, 1909, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

32 In the Circuit Court of the United States for the District of Oregon.

SOUTHERN PACIFIC COMPANY, a Corporation, Complainant,

vs.

CITY OF PORTLAND, a Municipal Corporation, Defendant.

Answer.

Now comes the defendant by protestation, not confessing or acknowledging all or any of the matters or things in the bill of

complaint contained to be true, in such manner and form as the same are therein set forth and alleged, or otherwise; and saving and reserving unto itself, now and at all times hereinafter, any and all manner of benefit and advantage to objection and rejection which may be had or taken to the manifold insufficiencies of the said bill of complaint, and for its answer to said bill of complaint (said answer not being under oath, answer under oath being expressly waived by the complainant in said bill), the defendant above named admits, denies and alleges as follows:

I.

Defendant denies each and every allegation, matter and thing in Paragraph I of Complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that it is and was, at all times mentioned in complainant's bill of complaint, a municipal corporation, organized and existing under and by virtue of the laws of the State of Oregon, and that the Complainant is now, and has been for several years last past, a corporation organized and existing under and by virtue

33 of the laws of the State of Kentucky; but it alleges that neither defendant nor its officers or agents has any knowledge or information as to how long the complainant has been so incorporated.

II.

Defendant denies each and every allegation, matter and thing in paragraph II of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the City of Portland is a municipal corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

III.

Defendant denies each and every allegation, matter and thing in paragraph III of complainant's bill of complaint alleged save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the matter and amount in dispute in this suit exclusive of interest and costs, exceeds the sum of \$2000.00.

IV.

Defendant denies each and every allegation, matter and thing in paragraph IV of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the Oregon Central Railroad Company was a corporation from about the year 1869 until about the year 1906, and that said corporation was organized and existed under the laws of the State of Oregon and that it was authorized to construct and operate a railroad within said state.

Defendant admits that on the 6th day of January, 1869, it duly passed ordinance No. 599 of the City of Portland, which was duly

34 approved by the Mayor of said City, and that the copy of said ordinance as set forth in paragraph IV of complainant's bill of complaint is substantially a correct copy thereof, except that the same does not show the signature of the Mayor thereto, which said signature is appended to the original.

Defendant admits that said Oregon Central Railroad Company accepted said ordinance.

V.

Defendant denies each and every allegation, matter and thing in paragraph V of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the copies of sections 5077 and 5078 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon are substantially correct copies of said sections.

VI.

Defendant denies each and every allegation, matter and thing in paragraph VI of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the Oregon and California Railroad was incorporated under the laws of the State of Oregon, and also admits that ordinance No. 16491 was duly passed and approved on May 1st, 1907.

VII.

Defendant denies each and every allegation, matter and thing in paragraph VII of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that said complainant is now and for more than two years last past has been operating steam locomotives, passenger and freight cars over and upon the tracks in said Fourth Street in said City.

35

VIII.

Defendant denies each and every allegation, matter and thing in paragraph VIII of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that ordinance No. 16491 of said City was duly passed and went into force and effect on May 1st, 1907.

IX.

Defendant denies each and every allegation, matter and thing in paragraph IX of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that on or about the 16th day of November, 1908, a complaint of the general tenor and effect set forth in paragraph IX of complainant's bill of complaint was filed in the municipal court of said City of Portland and thereafter a warrant was duly issued out of said municipal court and James P. O'Brien, the then and now General Manager of the complainant and the

person under whose direction and by whose authority the locomotive mentioned in the complaint in said Municipal Court was operated over said Fourth Street, was taken into custody.

Defendant admits that James P. O'Brien was thereafter released upon his own recognizance and that said cause was continued for a further hearing and the same is now pending in said Municipal Court.

X.

Defendant denies each and every allegation, matter and thing in paragraph X of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the legislative assembly of Oregon duly enacted an act to incorporate the City of Portland and the
36 same was approved on or about January 23rd, 1903, and is now in force.

XI.

Defendant denies each and every allegation, matter and thing in paragraph XI of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the quotation from the Charter of the City of Portland contained in Paragraph XI of complainant's bill of complaint is a substantially correct copy of a certain part of the charter of the said City of Portland, approved January 23rd, 1903.

Defendant admits that complainant can enter the City of Portland and the Union Depot therein from the West side of the Willamette River by way of Oswego, Oregon, and down the East side of said River and across the same by means of the Steel Bridge in said City.

XII.

Defendant denies each and every allegation, matter and thing in paragraph XII of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the legislature of the State of Oregon passed an act containing the quoted portions alleged in paragraph XII on complainant's bill of complaint.

XIII.

Defendant denies each and every allegation, matter and thing in paragraph XIII of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the incorporators of the Oregon Central Railroad Company have attempted to effect a dissolution of said Company.

37

XIV.

Defendant denies each and every allegation, matter and thing in paragraph XIV of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the Southern Pacific Company operates

ten or more passenger trains and two or more freight trains per day over the track on Fourth Street in said City.

XV.

Defendant denies each and every allegation, matter and thing in paragraph XV of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that the quotations of sections 18 and 21 of article I of the Constitution of the State of Oregon and the fourteenth amendment of the Constitution of the United States, and sections 8 and 10 of article I of the Constitution of the United States are each and all substantially correct as alleged in paragraph XV of complainant's bill of complaint.

XVI.

Defendant denies each and every allegation, matter and thing in paragraph XVI of complainant's bill of complaint alleged, save and except such as are in this paragraph expressly admitted or explained.

Defendant admits that it is the intention of said defendant, through the proper authorities, to fully enforce said ordinance No. 16491.

For further answer herein and as a cause why the complainant is not entitled to any relief in this suit, the defendant alleges:

38 That Ordinance No. 599 of the City of Portland hereinbefore referred to, being the ordinance under which the complainant claims the right to operate its locomotives and cars on Fourth Street in said City, was enacted and went into effect January 26th, 1869. At that time the population of the City of Portland was approximately seven thousand five hundred persons. The said City of Portland is divided by the Willamette River into two parts, commonly known as the East side and the West side. Upon the West side of said river is the principal business district of the City and also a large residence district, furnishing homes for upwards of seventy five thousand persons. That Fourth Street in said City runs North, and South. That between Fourth Street and the Willamette River, and parallel therewith are Third, Second First and Front Streets. Westerly from Fourth Street and parallel therewith are many streets numbered consecutively in an ascending scale. That at the time of the passage of said Ordinance No. 599 the business district of the City was along Front Street and the Willamette River. That at that time no business houses or commercial enterprises were located upon Fourth Street, and there was practically no population upon Fourth Street, or, that the population was so situated with reference to it, that the said Fourth Street was not used or occupied for general public travel and said Fourth Street was not graded, paved, or open or in condition for public travel and that the entire district adjoining said Street and westerly therefrom was substantially without population.

That on the first day of May 1907, and at the time of the passage of Ordinance No. 16491, of the City of Portland, hereinbefore and in

the bill of complaint herein referred to, the population of the City of Portland was, and ever since has been, and now is upwards of two hundred twenty five thousand persons. That the business district of the City was on said first day of May 1907, and

39 now is approximately within the following boundaries, to-wit:

Upon the East by Grand Avenue on the East of the Willamette River, upon the South by Jefferson Street, upon the West by Thirteenth Street and upon the North by the Willamette River. The business center of the business district of the City of Portland is upon Front, First, Second, Third, Fourth, Fifth and Sixth Street, between and where they are intersected by Morrison, Alder, Washington, Stark and Oak Streets. That along Fourth Street for many blocks are business houses of many kinds, including hotels, schools, wholesale houses, shops, stores, department stores, County Court House and City Hall, and upon this street are located many of the principal business houses of the City of Portland. Fourth Street is also intersected by street car lines running in an easterly and westerly direction along and upon Glisan Street, Burnside Street, Washington Street and Morrison Street, and said Street car lines afford transportation facilities for a majority of the population of the west side and to and from the business section of the west side and the homes of upward of seventy five thousand persons living upon the west side, and during fifteen or sixteen hours of each day upon said intersecting streets upwards of a dozen cars cross said Fourth Street every minute. That Fourth Street is one of the principal arteries of travel of the City of Portland and constantly every day many thousand people in the pursuit of their usual business and hundreds of teams, and vehicles engaged in ordinary business, travel upon, and across said Fourth Street and there is almost continually a great congestion upon said Fourth Street at its intersection with Glisan, Burnside, Stark, Washington and Morrison Streets.

That there are large water mains, gas mains and other utilities serving the public, crossing and along said Fourth Street in the business center of said City, which are disturbed, broken and partially destroyed by the vibration of the trains on said

40 Fourth Street to the great injury and damage of the public.

That just South and rising from the center of the business district there is a pronounced ascent or grade southerly along said Fourth Street, and at several points along the line of railroad upon said Fourth Street the ascent is about four per cent; or in other words, there is an ascending grade of four feet in every running hundred feet.

That notwithstanding the aforesaid facts and conditions the complainant at all times in the past has, and now does run and operate over said railroad tracks upon said Fourth Street, heavy trains of freight cars, drawn by large steam locomotives; that the operation of said cars and locomotives constitute and are and for several years last past, and at the time of the enactment of said Ordinance No. 16491, have been a grave and constant menace to the safety, lives and limbs of the people of the City of Portland

and the public generally and a serious and constantly increasing impediment to traffic and is a check upon the growth and development of said City. That the noise, roar, vibration and the emissions of smoke, steam, soot and cinders incidental to the operation of said cars and locomotives, were and are a source of constant danger to property and a constant and increasing source of danger, discomfort and inconvenience to the lives, health, safety and comfort of the citizens of Portland and of the public generally; and the said Ordinance No. 16491 was enacted by the Council of the City of Portland under and by virtue of the authority of and pursuant to the reserved powers in said Ordinance No. 599, and in the proper and reasonable exercise of the police powers of the City of Portland for the protection of property and the lives, health, safety and comfort of the citizens thereof, and the public generally.

41 Defendant further answering denies each and every allegation, matter and thing in complainant's bill of complaint contained, not hereinbefore expressly admitted or explained.

Wherefore, this defendant prays that the bill of complaint be dismissed upon the merits thereof and that the complainant be granted no relief whatsoever in the premises and that the defendant have judgment against the complainant for its costs and disbursements herein and for such other and further relief as to the Court may seem just and equitable.

HARRY LANE,

Mayor of said City of Portland.

J. P. KAVANAUGH,

*City Attorney and Solicitor for the Defendant,
City of Portland.*

STATE OF OREGON,

County of Multnomah, ss:

I, Harry Lane, being first duly sworn depose and say, that I am the Mayor of the Above named City of Portland. That so much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge, and that so much thereof that concerns the acts and deeds of such other person or persons, I believe to be true.

HARRY LANE.

Subscribed and sworn to before me this 31st day of March, 1909.

[SEAL.]

WM. C. BENBOW,

Notary Public for Oregon.

42 STATE OF OREGON,

County of Multnomah, ss:

Due and legal service of the within Answer is hereby accepted in Multnomah County, Oregon, this 31st day of March, 1909, by receiving a copy thereof, duly certified to as such by J. P. Kavanaugh, of Attorneys and Solicitors for City of Portland.

WM. D. FENTON,

Attorney for Plaintiff.

Filed March 31, 1909. G. H. Marsh, Clerk of the U. S. Circuit Court for the District of Oregon.

43 And Afterwards, to wit, on the 30th day of April, 1909, there was duly filed in said Court, a Replication, in words and figures as follows, to wit:

44 In the Circuit Court of the United States for the District of Oregon.

SOUTHERN PACIFIC COMPANY, Complainant,
vs.
CITY OF PORTLAND, a Municipal Corporation, Defendant.

Replication.

The Replication of the Above Named Complainant to the Answer of the Above Named Defendant.

This replication, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant. And further replying, this replicant denies each and every allegation, matter and thing in said answer contained not herein expressly admitted.

All which matters and things this replicant is ready to aver, maintain and prove, as this honorable court shall direct, and humbly as in and by its said bill it has already prayed.

WM. D. FENTON,
R. A. LEITER,
J. E. FENTON,
BEN C. DEY;
Solicitors for Complainant.

45 STATE AND DISTRICT OF OREGON,
County of Multnomah, ss:

I, J. P. O'Brien, being first duly sworn, depose and say: That I am General Manager for the Lines in Oregon of the complainant company; that I have read the foregoing replication, know the contents thereof, and that the same is in all respects true of my own knowledge.

J. P. O'BREEN.

Subscribed and sworn to before me this 28th day of April, 1909.

[*initialed*]

W. H. GUILD,
Notary Public for Oregon.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within replication is hereby accepted in Multnomah County, Oregon, this 29th day of April, 1909, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, of Attorneys for Complainant.

J. P. KAVANAUGH,
Attorney for Defendant.

Filed April 30, 1909. G. H. Marsh, Clerk of the U. S. Circuit Court for the District of Oregon.

46 And Afterwards, to wit, on the 4th day of April, 1910, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

47 In the Circuit Court of the United States for the District of Oregon.

No. 3407.

SOUTHERN PACIFIC COMPANY, Plaintiff,
vs.

CITY OF PORTLAND, a Municipal Corporation, Defendant.

Wm. D. Fenton, Ben C. Dey, R. A. Leiter and James E. Fenton,
Attorneys for plaintiff.

John P. Kavanaugh and W. C. Bembow, Attorneys for Defendant.

BEAN, *District Judge:*

This is a suit to enjoin the City of Portland from enforcing Ordinance No. 16491, adopted in May, 1907, making it unlawful for the Oregon Central Railroad Company, "its successors, assigns or their lessees, or any other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after 18 months from the final passage or approval of this Ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street". The plaintiff is occupying and using the street in question for railway purposes, as the assignee, lessee or successor in interest of the Oregon Central Railroad Company which, by Ordinance No. 599, approved January 6, 1869, was "authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland to the north side of "G" (now Glisan) Street, and as much farther north as said Fourth Street may extend or be extended upon the terms and conditions" as therein provided.

48 By Section 3 of the Ordinance "The Common Council reserve the right to make or alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives (within said limits) and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary." The terms and conditions of the Ordinance were accepted by the grantee and it proceeded to construct its road along the street and such road has ever since been used and operated by it and its successors in interest for railway purposes, and numerous freight and passenger trains propelled by steam locomotives now pass over the road daily.

At the time of the passage of Ordinance No. 599, the City had no express authority given it to grant franchises for the construction or operation of railroads on its streets. Under the general law of the state, however, a railroad corporation was authorized, when necessary and convenient in the location of its road "to appropriate any part of any public road, street or alley or public grounds" but if it desired to appropriate a street within the limits of an incorporated town or city, the company was required to locate its road upon such street as the local authorities might designate. (Sec. 5077-5078 B. & C. Comp.)

The plaintiff contends that this legislation and the Ordinance of the city designating the street upon which its grantee should locate its road gave to the grantee and its successors or assigns a perpetual right or franchise to use the street for railway purposes, which cannot be revoked or impaired by subsequent legislation, and

49 that Ordinance No. 16491 is void, so far as it prohibits the use of steam locomotives or freight cars on or along the street because first: it impairs the obligation of the contract under which the road was located, and interferes with vested rights of property. Second: it deprives the plaintiff of its property without due process of law. Third: it deprives it of the equal protection of the laws. And fourth: it is an unlawful interference with Interstate Commerce.

The position of the city on the other hand is first that at the time of the passage of Ordinance No. 599 the city had no power or authority to grant franchises for the use of its streets for railway purposes. Second; that such ordinance was merely a license or permission on the part of the Council to the grantee named therein to use the street, revocable at any time. Third: that the grant was personal to the grantee, and it had no power or authority to assign or transfer the rights thereby granted without the consent of the city. And fourth: that by the terms of the ordinance the city reserved the right to regulate the use of the street for railway purposes to the exclusion of steam locomotives and freight cars therefrom whenever in the judgment of the Council such legislation was necessary or advisable.

I do not deem it necessary to consider all of these questions at this time. In any view, the city was vested with the right and power at the time Ordinance No. 599 was passed to designate the street upon which the company should locate its road, and this carried with it

the power to impose reasonable conditions to such grant or permission which, when accepted by the grantee, became binding upon it. *Pittsburg C. & St. L. Ry. vs. Hood*, 94 Fed. 618. *Southern Bell Tel. & Tel. Co. vs. City Mobile*, 162 Fed. 523.

Whether the ordinance is considered a franchise, license or mere permission, it gave the consent of the city to the use of the street for railway purposes upon certain terms and conditions, and when accepted became in effect a contract between the city and the company. It may be conceded for the purposes of this case that the city could not subsequently revoke the permission thus given or impair or destroy the rights thereby conferred. No attempt is made to do so by Ordinance No. 16491. Its only purpose is to regulate the use of the railroad. The passage of Ordinance No. 599 did not deprive the city of its police powers,

N. P. vs. State of Minnesota, 208 U. S., 583.

Beer Co. vs. Mass., 97 U. S., 25.

Mugler vs. Kansas, 123 U. S., 623.

nor of the right to exercise the power and authority expressly reserved and stipulated in the contract between it and the railroad company. The grant or permission was made or given by the city and accepted by the company upon the terms and conditions therein specified which, among other things, included the right of the city to make regulations for the conduct of the road at any time the Common Council might deem proper, to regulate the speed of the cars and locomotives and to restrict and prohibit the running of locomotives at such times and in such manner as the Council may deem necessary. The authority thus reserved is broad and general in its terms, and while a technical construction of some of the language may support the argument of the plaintiff that it was thereby intended to reserve the power to regulate and not prohibit the use of steam locomotives, I think the plain intention was to reserve the right to make such rules and regulations covering the operation of the road as might, from time to time, be necessary even to the extent of prohibiting the use of steam locomotives or freight cars whenever such legislation might be necessary for the safety or convenience of the public. If, however, the language of the ordinance is involved or doubtful, it should be construed against the grantee and in favor of the public for, as said by the Supreme Court in *O. R. N. vs. The Oregonian Ry.*, 130 U. S. 1, "when a statute makes a grant of property, powers or franchises to a private corporation or to a private individual, the construction of the grant in doubtful points should always be against the grantee, and in favor of the government." See also to the same effect *Freeport Wtr. Co. v. Freeport City*, 180 U. S. 587; *Burns vs. Multnomah Ry. Co.* 16 Fed., 177.

I conclude therefore that the legislation complained of is valid because within the powers reserved to the city by the ordinance under which the plaintiff is now occupying the street.

But if I am mistaken in this view it is still, in my opinion, valid because within the general police power of the city. The grant, per-

mission, license or authority, whatever it may be called, of plaintiff's grantor to occupy the street for railway purposes was necessarily made and accepted subject to the right of the city, under its police power, to make such regulations concerning the use thereof as the public safety and welfare might from time to time require. The legitimate exercise of legislative power in securing the public safety, health and morals is not within the inhibition of the Federal Constitution against the impairment of obligations of contracts, the deprivation of property without due process of law, or the equal protection of the laws, for as said by Mr. Chief Justice Fuller "the governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." N. Y. & N. E. R. R. vs. Bristol, 151 U. S. 567. Every grant therefore of a public franchise or right is subject to the legitimate exercise of police power by the state or municipality and it has been decided that the power to order and establish suitable police regulations authorizes municipal corporations to prohibit the use of steam locomotives in the public streets when such action does not interfere with vested rights. R. R. Co. vs. Richmond, 96 U. S. 521.

52 There is no express stipulation in Ordinance No. 599 that the grantee should be permitted to use steam locomotives as a motive power for the propelling of trains over the road therein specified, or that it might use freight cars thereon. The right granted was simply to lay "a railroad track and run cars over the same" and nothing is said about motive power or the character of the cars. The grantee therefore occupied the street subject to the general power of the city in respect to the use of the road when constructed. The legislation complained of therefore does not impair any vested rights expressly given by the ordinance, and it is not for the court to determine in this case whether the power reserved to the city has been judiciously exercised. It is clearly not void as an unreasonable or arbitrary exercise of such power. At the time the city granted to the plaintiff's predecessors in interest authority or permission to occupy Fourth Street for railway purposes, the street was an unimproved back street with scattering dwellings along it and no business houses. It is now practically in the heart of the business district and is one of the principal business streets of the city. It is frequented daily by a large number of persons, teams and vehicles constantly travelling along and across the street during business hours. It is quite steep throughout the business district, and the noise, vibration, smoke, cinders and soot from the moving steam locomotives and trains seriously interfere with the transaction of public and private business, and it is a constant source of danger and inconvenience to the public.

53 The court therefore cannot declare that the provisions of the ordinance sought to be enjoined are unreasonable or arbitrary, and since it is within the legitimate police power of the municipality, it must be upheld.

It follows that the complaint must be dismissed and it is so ordered.

Portland, Oregon, April 4, 1910.

Filed April 4, 1910. G. H. Marsh, Clerk of the U. S. Circuit Court District of Oregon.

54 And afterwards, to wit, on Monday, the 18th day of April, 1910, the same being the 7th Judicial day of the Regular April, 1910, Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

55 In the Circuit Court of the United States for the District of Oregon.

No. 3407.

SOUTHERN PACIFIC COMPANY, Complainant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation, Defendant.

Decree.

APRIL 18, 1910.

This is a suit brought by the complainant, Southern Pacific Company, against the defendant, the City of Portland, to enjoin the city from prosecuting the complainant company, together with one James P. O'Brien, its manager for violating a certain ordinance of the City of Portland, namely Ordinance No. 16491, prohibiting the operation of steam locomotives and freight cars on Fourth Street in said city.

Said suit was set for trial and argument before the Honorable R. S. Bean, Judge of said court, in the United States Circuit Court Room in the City of Portland, State of Oregon on the 1st day of December, A. D. 1909, and came duly on for trial and argument at said time and place. The complainant appeared by Messrs. Wm. D. Fenton, R. A. Leiter, Ben C. Dey and James E. Fenton, its Solicitors, and the defendant appeared by J. P. Kavanaugh and Wm. C. Benbow, City Attorney and Solicitors.

Said cause was heard upon the pleadings and proofs of the parties and upon the written and oral argument of the respective solicitors.

Now, having heard and considered all matters involved; it is hereby ordered, adjudged and decreed that the above named complainant is not entitled to the relief prayed for in its bill of complaint herein, or to any relief herein whatever; and it is further ordered, adjudged and decreed that said cause and said bill of complaint be and the same are hereby in all things dismissed on

56 the merits; and it is further ordered, adjudged and decreed that defendant have and recover of the complainant its costs and disbursements to be taxed by the clerk of this court and inserted herein, and which have been taxed at \$—; and that execution issue therefor.

And it appearing to the court that a violation of said Ordinance No. 16491 is attended by severe and heavy penalties, and that the

public interests, temporarily at least, require the operation of its trains by the complainant over said Fourth Street into the City of Portland, and it further appearing that the importance of the questions involved in this case will doubtless occasion an appeal, and that if on such appeal said Ordinance should be adjudged invalid, and in the meantime said ordinance and the penalties therein provided be enforced, said Southern Pacific Company would suffer great and irreparable damage.

It is therefore ordered and adjudged that the restraining order and injunction entered herein be and the same is hereby restored and continued in force for the term of ten days from the date hereof, and if, in the meantime, an appeal from this decree is taken, it is ordered and decreed that said injunction and restraining order be and the same is hereby continued in force until said appeal shall be heard and determined by the Appellate Court, or until that court shall order to the contrary.

R. S. BEAN, *Judge*.

Dated: April 18, 1910.

Filed April 18, 1910. G. H. Marsh, Clerk of U. S. Circuit Court, District of Oregon.

57 And Afterwards, to wit, on the 18th day of April, 1910, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

58 In the Circuit Court of the United States for the District of Oregon.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff,
vs.

CITY OF PORTLAND, a Municipal Corporation, Defendant.

The above named plaintiff, conceiving itself aggrieved by the decree made and entered in the above entitled court on the 18th day of April, 1910, in the above entitled cause, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States; that the restraining order and injunction heretofore issued in this cause may be continued pending said appeal, and that the judge of the above entitled court may be pleased to fix the amount of the bond for said plaintiff, for costs and damages, and approve said bond.

WM. D. FENTON,
BEN C. DEY,
R. A. LEITER AND
JAMES E. FENTON,

Solicitors for Southern Pacific Company.

Dated this 18th day of April, 1910.

DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within petition for appeal is hereby accepted in Multnomah County, Oregon, this 18th day of April, 1910, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, of Attorneys for plaintiff.

WM. C. BENBOW,
Of Attorneys for Defendant.

Filed April 18, 1910. G. H. Marsh, Clerk of U. S. Circuit Court, District of Oregon.

59 And Afterwards, to wit, on the 18th day of April, 1910 there was duly filed in said Court, an Assignment of Errors, in words and figures as follows, to wit:

60 In the Circuit Court of the United States for the District of Oregon.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff,
vs.
CITY OF PORTLAND, a Municipal Corporation, Defendant.

Assignment of Errors.

The plaintiff, Southern Pacific Company, prays an appeal from the final decree of this court heretofore on 18th day of April, 1910, entered herein, to the Supreme Court of the United States, and assigns for error:

First. That said Circuit Court erred in deciding that the plaintiff is not entitled to the relief prayed for in its bill of complaint, or to any relief whatever in said cause.

Second. That said Circuit Court erred in dismissing said cause and said bill of complaint.

Third. That said Circuit Court erred in refusing to grant to plaintiff the relief prayed for in its bill of complaint herein.

Fourth. That said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, is in contravention of Section 18, Article I, of the Constitution of the State of Oregon, which provides:

"Private property shall not be taken for public use, nor the particular services of any man demanded without just compensation; nor, except in case of the state, without such compensation first assessed and tendered."

Fifth. That said Ordinance No. 16491 passed by the Common Council of the City of Portland, on May 1, 1907, is in contravention of Section 21, Article I, of the Constitution of the State of Oregon, which provides:

61 "No ex post factor law, or law impairing the obligations of contracts, shall ever be passed, the taking effect of which

shall be made to depend upon any authority, except as provided in this Constitution: Provided, that laws locating the capital of the state * * * may take effect or not, upon a vote of the electors interested."

Sixth. That said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, is in contravention of the Fourteenth Amendment to the Constitution of the United States, which provides among other things as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And said ordinance is void particularly in this, that its enforcement will deprive the Southern Pacific Company and the Oregon & California Railroad Company of its property, to-wit, its rights under said Ordinance No. 599, and under the Act of Congress of May 4, 1870, without due process of law, and is a denial to said Southern Pacific Company and said Oregon & California Railroad Company of the equal protection of the laws.

Seventh. Said Ordinance No. 16491 passed by the Common Council of the City of Portland, on May 1, 1907, violates Article I, Section 8, paragraph 3, of the Constitution of the United States, which provides:

"The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 8, of the Constitution of the United States, which provides:

"The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof,"

62 and particularly in this, that the enforcement of said ordinance by said City of Portland will interfere with, restrain and prevent the movement of interstate commerce, and is a burden upon said interstate commerce so being carried by said Southern Pacific Company between Corvallis and said northerly terminus of said railroad at the intersection of Fourth Street and North Front Street, and to connection with other carriers doing business at said last named point, and impairs the rights granted by said Act of Congress of May 4th, 1870.

Eighth. Said Ordinance No. 16491 is void and of no force and effect in this, that it provides for excessive, unusual penalties, fines and punishments, and thereby deprives the Southern Pacific Company and its officers and agents, and other citizens of the United States, of the equal protection of the law, and thereby takes the property of the complainant without due process of law.

Ninth. Said Ordinance No. 16491 is void and of no force and effect in this, that it violates Section 10, Article I, of the Constitution of the United States, which among other things provides, "No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," and that the said ordinance attempts to and if enforced will impair the obligation of the contract created between the Oregon Central Railroad Company, its successors and assigns, and the said City of Portland, under said Ordinance No. 599.

Tenth. The said Ordinance No. 16491 is void and of no force and effect in this, that it is unreasonable, arbitrary, and oppressive, and particularly in this, that although said railroad has been continuously operated over said Fourth Street as aforesaid, with steam locomotives for thirty-nine years, there has never been any serious accident or injury caused to anyone thereby, and by reason of the

63 physical location of the said City of Portland, and the location of the line of railroad under said Act of Congress of May 4th, 1870, and under the Articles of Incorporation of the Oregon Central Railroad Company, it was and is physically impossible to construct, locate or operate a line of railroad into the City of Portland from the south boundary thereof into the terminals and station of the said Southern Pacific Company, now within the yards of the Northern Pacific Terminal Company, over or upon any other route, line, or street other than said Fourth Street where the same has been so continuously operated and maintained.

Eleventh. Said Ordinance No. 16491 is in violation of subdivision 3 of Section 73 of the Charter of the City of Portland, which provides:

"The Council has power and authority, subject to the provisions, limitations and restrictions in this charter contained * * * to provide for the punishment of a violation of any ordinance of the city by fine or imprisonment not exceeding Five Hundred Dollars fine, or six months imprisonment, or both, or by forfeiture, as penalty."

Wherefore plaintiff prays that the decree of the said Circuit Court be reversed and that the restraining order and injunction heretofore entered be continued pending the appeal.

WM. D. FENTON,
BEN C. DEY,
R. A. LEITER AND
JAMES E. FENTON,
Solicitors for Plaintiff.

64 DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within assignment of errors is hereby accepted in Multnomah County, Oregon, this 18th day of April, 1910, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, of Attorneys for plaintiff.

WM. C. BENBOW,
Of Attorneys for Defendant.

Filed April 18, 1910. G. H. Marsh, Clerk of the U. S. Circuit Court, District of Oregon.

65 And afterwards, to wit, on Monday, the 18th day of April, 1910, the same being the 7th Judicial day of the Regular April, 1910, Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

66 In the Circuit Court of the United States for the District of Oregon.

No. 3407.

SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff,
vs.
CITY OF PORTLAND, a Municipal Corporation, Defendant.

Order.

APRIL 18, 1910.

It appearing to the court that plaintiff has filed herein its assignment of errors and its petition praying that an appeal may be allowed to the Supreme Court of the United States from the decree made and entered in said court in said cause on the 18th day of April, 1910; that the restraining order and injunction heretofore issued in this cause may be continued pending said appeal, and that the judge of the above entitled court may be pleased to fix the amount of the bond for said plaintiff for costs and damages, and approve said bond,

It is ordered that the appeal of said plaintiff, Southern Pacific Company, to the Supreme Court of the United States from the decree made and entered in this court in this cause on the 18th day of April, 1910, be and the same is hereby allowed, and that said plaintiff give its bond to the defendant for costs and damages on said appeal, with a surety to be approved by this court, for the sum of One Thousand Dollars (\$1000), which shall operate as a supersedeas bond.

It is further ordered that the restraining order and injunction heretofore issued in this cause be and the same is hereby restored and continued in force until the final determination of said appeal or until said Appellate Court shall order the contrary.

Dated at Portland, in the District of Oregon, this 18th day of April, 1910.

R. S. BEAN, *Judge.*

Filed April 18, 1910. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon.

67 And Afterwards, to wit, on the 18th day of April, 1910, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

68 In the Circuit Court of the United States for the District of Oregon.

• SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiff,

vs.

CITY OF PORTLAND, a Municipal Corporation, Defendant.

Know all men by these presents, That we, Southern Pacific Company, a corporation organized under the laws of the State of Kentucky, as principal, and R. Koehler, as surety, are held and firmly bound unto the City of Portland, Multnomah County, Oregon, in the full and just sum of One Thousand Dollars to be paid to the said City of Portland, its attorneys, successors or assigns, to which payment well and truly to be made said Southern Pacific Company for itself and its successors and assigns, and said R. Koehler, for himself and his heirs, executors and administrators, bind themselves jointly and severally by these presents.

Whereas the above named plaintiff, Southern Pacific Company, has prosecuted an appeal to the United States Supreme Court to reverse the decree in the above entitled cause made by the Circuit Court of the United States for the District of Oregon on the 18th day of April, 1910, and said appeal has been allowed by said court,

Now therefore, the condition of this obligation is such that if the above named plaintiff shall prosecute such appeal to effect, and answer all damages and costs if it fails to make such appeal good, then this obligation to be void, otherwise to remain in full force and virtue.

69 In witness whereof said Southern Pacific Company has caused these presents to be signed by its General Manager for Lines in Oregon, he being thereunto duly authorized; and said R. Koehler has hereunto set his hand and seal, both on this 18th day of April, 1910.

SOUTHERN PACIFIC COMPANY,
By C. G. SUTHERLAND,
For General Manager Lines in Oregon.
R. KOEHLER, Surety. [SEAL.]

Witnesses:

R. A. LEITER.
N. C. SOULE.

DISTRICT OF OREGON,
County of Multnomah, ss:

I, R. Koehler, whose name is subscribed as surety to the within bond, being duly sworn say that I am a resident and householder within the State of Oregon; that I am not a counsellor or attorney at law, sheriff, clerk, or other officer of any court, and am worth the sum of \$2,000 over and above all my just debts and liabilities, exclusive of property exempt from execution.

R. KOEHLER.

Subscribed and sworn to before me this 18th day of April, 1910.

[SEAL.]

N. C. SOULE,

Notary Public for Oregon.

Approved by

(Sgd.) R. S. BEAN, *Judge.*

70 DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within bond on appeal is hereby accepted in Multnomah County, Oregon, this 18th day of April, 1910, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, Attorney for plaintiff.

WM. C. BENBOW,
Of Attorneys for Defendants.

Filed April 18, 1910. G. H. Marsh, Clerk of U. S. Circuit Court, District of Oregon.

71 And, to wit, on the 15th day of January, 1910, there was filed in said Court, the testimony taken upon the final hearing, in words and figures as follows, to wit:

72 In the Circuit Court of the United States for the District of Oregon.

No. 3407.

SOUTHERN PACIFIC COMPANY, Plaintiff,

vs.

CITY OF PORTLAND, a Municipal Corporation, Defendant.

W. D. Fenton, Ben C. Dey, R. A. Leiter and James E. Fenton. for Plaintiff.

John P. Kavanaugh, City Attorney, and W. C. Benbow, for defense.

Before Judge R. S. Bean.

PORTLAND, OREGON, *December 1, 2, 3 & 24, 1909.*

For Plaintiff:

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PORTLAND, OREGON, *December 4, 1909*—10 a. m.

JOSEPH GASTON, a witness called on behalf of the complainant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Gaston, state your name, age and residence.

A. Joseph Gaston; Portland, Oregon, 76 years old.

Q. You were one of the original promoters, if not the original promoter, of the construction of the railroad known as the Oregon Central Railroad Company at Portland, from Portland to McMinnville:

A. Yes, sir.

Q. Were you not—I wish you would state to the Court the general situation, and circumstances and time under which the railroad referred to was constructed from "G" Street in the City of Portland, by way of 4th Street, to St. Joseph, near McMinnville, in Yamhill County, Oregon, and by way of Forest Grove, giving in your own

language the origin and situation of the road, the situation of the city, and the circumstances under which this road was constructed at that point.

A. It seems to me to answer that would be a good deal which might not be material; if I am to select the points, and give the facts, why, I will endeavor to make it as brief as possible.

Q. Very well, yes.

A. Now the company was incorporated and organized in 18—
76 incorporated in 1867, and we commenced work at the southern boundary of the city as we supposed, in April, 1868, and continued to work until the work—until the grading was completed and all bridges built to the town of Hillsboro, Washington County. After we had commenced this work various negotiations were had with the authorities of the City of Portland; possibly some of those negotiations commenced before we actually did commence work, but they were going on more or less all the time with the mayor and the city council after we had commenced work. The first thing we did in Portland prior to that was to solicit subscriptions to the capital stock.

Mr. KAVANAUGH: If the Court please, I think this is all immaterial.

Mr. FENTON: I suggest, your Honor, that some of Mr. Gaston's testimony in the way of narrative might not be technically competent, but I think we probably will save time.

COURT: It is a suit in equity, and we might as well have the record complete, if counsel wishes.

Mr. KAVANAUGH: Save an exception.

A. We had solicited subscriptions to the capital stock from the City of Portland, and received money enough to do considerable work, and contract to do considerable work, and let a contract to build bridges the first five miles, and in pursuance of this, we entered into a contract with the City of Portland, by which the city guaranteed the interest on \$250,000 of the company's bonds, and a tax was levied to pay the interest on these bonds, and we received the interest for one year. Then, as we went forward, and in obedience to the reports of our engineers, it became necessary to select a route through the city to the north end of the city, because
77 one of the main inducements and material assets of the company was a contract on the part of John H. Couch, a land owner in the north end of the city, to give ten blocks to the company if it would locate its depot in the north end of the city. The corporation desired very much to accept that because we then believed that the north end of the city would be selected by all other roads coming to the city as a terminus grounds, and we desired to accept those blocks there in order to be in a good position to make connection with other roads. Now, to reach these blocks, that terminal ground, it was necessary to select a route through the city. The business of the city was then practically all on Front Street, and the business men all opposed the going, the placing of the railroad on Front Street, and it was objectionable in other ways because

it would require a severe grade, a grade that was impracticable with the engines that were then in use on railroads, to reach the top of the divide between Portland and Washington County, some three miles south; we could not reach that point with the railroad—with the locomotives and come in on Front Street, so that the engineers said the only practical thing to do was to take Fourth Street, and we could get up then on a 70-foot grade and cross the divide and get to Hillsboro, and Fourth Street was selected. Then the right of way through the city on Fourth Street was solicited of the city council, and as we proceeded strictly according to the state law as we looked at it—that if the city did not give us the right of way, we would go through there anyhow. We—our attorneys advised us that we had that right to go down Fourth Street, even if the

78 city council did not agree to it, but it was—we were working with the City Council; they were friendly to the road, as everybody else was in Portland, and it was no trouble at all to get the right of way. In fact, there was no opposition to it at all, none that I recollect. And I don't believe there was a single person in the city opposed to giving the right of way on Fourth Street, at that time. But they would be opposed to us if we undertook to go down Front Street, and that is the way we came to locate the line on Fourth Street.

Q. Now, Mr. Gaston, do you remember whether—have you that map—for the purpose of identification—I show the witness Plaintiff's Exhibit A, and will ask you, Mr. Gaston, if you recognize that.

Mr. KAVANAUGH: What map is that, Mr. Fenton?

Mr. FENTON: A map of the city of Portland.

Mr. KAVANAUGH: By whom?

Mr. FENTON: It is a railroad map of Portland.

Mr. KAVANAUGH: I have no knowledge of its correctness.

Mr. FENTON: This is identified for the purpose of showing the location of the track on Fourth Street. Then we will offer it later for the purpose of proving it is an accurate map of the City of Portland, with the railroad tracks etc. located thereon.

Q. I call your attention to the yellow line.

Mr. KAVANAUGH: We object, your Honor, to the use of the map at this time.

Court: If the witness can say it is correct—

Mr. KAVANAUGH: Sure, if those questions are put to him.

Marked Complainant's Exhibit A for identification.

79 Q. And ask you to state, from an inspection of this map, whether it is a relatively correct general map of the block and of the location of this railroad from Irving Street, where the Union Depot now is south along Fourth Street, as shown on this yellow line to Sheridan Street and thence over this red line indicating private right of way of the Company southerly out toward Bertha. First, do you recognize that as a fairly good and accurate map of the location?

Mr. KAVANAUGH: We object as improper.
Objection overruled. Exception taken.

Q. Here is Sheridan Street. This along out toward Bertha. There is Terwilliger's line down there.

A. Where is Terwilliger's?

Q. It is not shown on this map. Here is the southern boundary of the city.

A. Where is the line of the Carruther's claim?

Q. That is the southern boundary line.

A. I think that is a correct map of what it professes to be of the route of the railroad. Of course, I know how it is located along the side of the hill and how we got the right of way through private land. That has all been platted into blocks, since we built the railroad.

Q. I show you on this map a green line the southern boundary of the city, December 30, 1908, and ask you to state whether or not you recognize that as about the southern boundary line of the Carruther's Donation Land Claim.

Objection. Objection overruled. Exception saved.

A. I think that is correct. I think that is where we broke ground at that point.

80 Q. That was April 15, 1868?

A. Yes.

Q. I call your attention to a street on this map marked Sheridan Street, at the end of the yellow line.

A. Yes.

Q. And the red line, it purports to represent the acquisition of the right of way through private property, and ask you if you recollect that as about the point where you began to procure private right of way, and the end of the franchise as granted by ordinance of January 6, 1869?

A. Yes, I think that is the place. I think that is where Marquam's Gulch is, and right across there is a German tailor. We ran through his block in the first place. We had to pay him \$200 for his right.

Q. That is where you left Fourth Street?

A. Yes.

Q. No Fourth Street south of that?

A. The yellow line is the end of Fourth Street, as I recollect.

Q. At the north end, the franchise says, beginning at the end of G Street or at a point to which G Street may be extended. Do you recollect whether the road was begun to be extended from G Street practically, or whether it was further north or south in the beginning?

A. The station, I think, was right down there, probably on that block—

Q. Block 7?

A. Block 7—I think that is where the little station was.

Q. That is the station of the Oregon Central Railroad Company, West Side?

A. Oregon Central.

Mr. KAVANAUGH: What?

81 A. I think Block 7, a little old ramshackle station standing there yet, or was a few months ago, and this, of course, this was all level land along there, and C. H. Lewis and Dr. Glisan and Colonel McCracken all lived down there.

Q. Private residences down there at that time?

A. Yes, private residences. No business houses along here. This was all practically level.

Mr. KAVANAUGH: His testimony will not show anything.

Q. When you say that—

A. A point between Glisan Street and Couch land was all level. That is, between Ankeny Street, that was level, and between Ankeny Street and Washington Street it was practically all level, and was private residences all along there, and from Washington Street clear up to—

Q. Here is the City Hall—here is the Courthouse.

A. Where the City Hall is now. There was no City Hall there. That was Bishop Blanchett's office and residence there, or in the one above, and that was the—it had been grubbed out, but it was all just one wagon road. Wagons could travel over it, but there was no grading. I lived further up the street there, between Jefferson and—no, between Columbia and Clay. I lived up there between Clay and Columbia and I know when we graded the street, it filled up, made a bank in front of the house I lived in, four feet high. The company did the grading on the street when it was first graded there, and when we got the right of way, there was no grading. Wagons could go along just as we go through the country, through a country wood pasture, for instance.

Q. Any trees or timber in the street?

82 A. No, I think that was all rubbed out, but no grading of the street, but there was sidewalks, plank sidewalks on each side.

Q. Now, at that time, after this ordinance was passed, and the company had accepted the same, what, if anything, did the company do, towards improving the streets?

Mr. KAVANAUGH: Objected to as incompetent—has no possible relation to the issue.

Objection overruled. Exception taken.

A. Now, under a provision of the contract between the city and the company to earn the interest on the \$250,000 bonds, the company was under obligations to grade and bridge five miles of the track from the southern boundary of the city out towards Washington County, and that we did first, leaving the grading of Fourth Street inside the city boundaries to a subsequent date, and after we got the second land grant. That was while we were claiming the first land grant, which we had a legal and just title to, but after that was lost

to the company, we got the second land grant, and Mr. Holladay had purchased an interest in the road, and this grading was done inside the city by the company.

Q. Now, what date, about, was it when that grading was done inside the city on Fourth Street?

A. 1870-1871.

Q. I notice by this ordinance No. 599 passed January 6, 1869, giving the company the right to lay its railway track and run its cars on Fourth Street that the company was required to "grade—to establish grades, construct and maintain in good repair, 83 said street, at least six feet in width upon each side of the center line of said street and as much wider as may be affected by said railway, or the construction thereof and shall do and perform said work and the improvement and repair thereof in such manner and as often as the common council of the City of Portland may, at any time provide for or require." I wish you would tell the Court what the company did toward improving that street, paving it or planking it, or what it did, when it first appropriated the street to its use.

Mr. KAVANAUGH: Objected to.

Objection overruled. Exception saved.

A. Now, after the passage of that ordinance that you have read, the engineers said that we could not operate a line on the grades that was then established. Every 200 feet there would be a flat place in the grade of the city. You know every intersection of other streets, and the engineer said that must be equalized. That should be a regular grade from where it left, say, Washington Street—no, say Morrison Street, or it should be a regular grade up to the top of the hill above the Catholic Cemetery.

Q. That is St. Mary's?

A. Yes. So the City Council as I understood it—I did not look into the matter, because it was then in charge of Mr. Holladay's engineer, but the City Council as I understood it abrogated——

Mr. KAVANAUGH: I object to that.

COURT: He may tell what the company did.

A. The old grades.

Mr. KAVANAUGH: That should be stricken out.

84 COURT: I will not have it stricken out, because this an equity case.

Mr. KAVANAUGH: I object on the ground of hearsay, and save an exception.

A. Well, I know that whatever was done, it was agreed, and was actually carried out, that the grade was equalized, as the engineer would call it, from about Morrison Street to the top of the hill, so it was a regular grade. It was not all regular, but it was regular in two sections. It goes up to a certain point a lower grade, then a little steeper from thereon, but all of these little steps at the intersection of streets was wiped out, so the locomotives would not have

any trouble travelling. Then, we graded the whole thing and put a bridge at the end of Fourth Street, across the south boundary of this.

Q. Now, what improvements did you do by way of planking Fourth Street from the north end up to Sheridan?

Objected to. Objection overruled. Exception taken.

A. The first improvement is the improvement of twelve feet wide and grade—grading the route. Then we laid cross ties, and made the improvements twelve feet wide in the middle of the street. Afterward the city and the company got together. I don't know how they divided the expenses, but they put down planks down on each side of this twelve feet, two or three inches thick planks, from the twelve foot strip to the curb of the sidewalk, and that stood there until it rotted, and worn out. And then at the second improvement, the company did the whole improvements, as I was informed at the time.

Q. You were here during that time, were you?

A. Yes.

85 Q. And you know that the improvement was made of the whole of the street? Now, what kind of improvement was it?

A. That second improvement was a plank improvement too.

Q. From curb to curb?

A. Yes, and the third improvement was blocks—these hard blocks.

Q. Do you remember—you don't remember—

Mr. KAVANAUGH: You don't remember who paid for the improvement, do you?

A. The third, I think, was done by the city altogether, except the twelve feet by the company.

Q. Who did the second improvement?

A. The land holders, the property holders.

Q. I mean the planking of the street.

A. That was done, the second improvement was done, as I understood, by the company.

Q. What office did you hold in the company at that time?

A. Well, I was, up to the time I went out of office, I had been Secretary.

Q. And when was that?

A. About 1880, the second improvement was made.

Q. When was the first improvement made, that of the twelve feet and grading the street?

A. It was made in 1870, about 1873, I think, were the first planks, '72 or '73, the first planks were put down.

Q. Have you any idea, Mr. Gaston, about what the cost was, of making this plank improvement?

A. No, sir, I could not give the cost.

86 Q. Of planking the twelve feet.

A. No, I could not give you that.

Q. Was it a substantial sum or not?

A. Oh, yes, it cost a lot of money.

Q. Now, at that time I will ask whether Fourth Street extended—no, the map shows it did not. At that time Fourth Street, as I understand it, only extended to Sheridan Street.

A. Yes, sir.

Q. As shown on Plaintiff's Exhibit A.

A. Yes.

Q. How did you get your right of way from there south?

A. We made bargains with private parties, owners, and where we could not get them to donate the right of way, we paid for it.

Q. That was not acquired from the city?

A. No.

Q. Now, you have lived—how long have you known this railroad to be there? When was this railroad then, first begun to be operated with trains?

A. 1871.

Q. What time in 1871?

A. Well, it was, I think, about this time of the year we got the first train through to Cornelius.

Q. That would be December, 1871?

A. Yes, sir.

Q. And what—have you lived here or in the vicinity or in Washington County and known the operation of this railroad from that time to the present?

A. Yes, sir.

Q. What is the fact as to its having been continuously
87 operated over this Fourth Street and to McMinnville or to a point near—or St. Joe, near McMinnville, or the Yamhill River, as called for by the Act of Congress, since that time?

A. It has been operated continuously every day except a few days, I think a very deep fall of snow and the engines and trains did not get through for those few days, but run every day since.

Q. When was the first 20 miles completed?

A. Well, that was 1871.

Q. When was the road completed to the point named in the Act of Congress of May 4, 1870, near Forest Grove? Or rather, Forest Grove to St. Joe, near McMinnville?

A. That was in 1872.

Q. And was it operated continuously thereafter?

A. Yes.

Q. To that point?

A. Yes, until it was changed up to McMinnville, and then St. Joe was abandoned.

Q. Yes, when was that extension made?

A. Well, that was in 18—I think it was in 1880. Mr. Koehler will remember.

Q. Was Mr. Koehler here at the time it was extended?

A. Yes.

Q. Now, roughly speaking, I will ask you if you remember whether or not this \$250,000 bond issue of the City of Portland was authorized by an ordinance of the city?

A. Yes, sir.

Q. And do you remember what became of that ordinance?

A. The ordinance?

Q. Yes. I mean what result.

88 A. Why, the East Side Company that was then fighting us, got up a law suit by one Mr. Coulson, who claimed to—I think he claimed to be a citizen of California, although he had been County Clerk here for years, but he was an instrument in the hands of Mitchell and Dolph, who was interested in this East Side Company; he got a suit in this court and Judge Deady decided that the city had no right to make such contracts or sign such bonds.

Q. And the ordinance was adjudged to be invalid?

A. Yes.

Q. I will ask if you recall that that was the case of Henry Coulson and Teresa E. his wife, v. The City of Portland, Hamilton Boyd, William S. Caldwell and C. P. Ferry, reported in Deady's Reports, Page 481?

A. Yes, that was the case.

Q. And that appears to have been decided December 12, 1868? That was after the passage of this ordinance. That is about the right date, is it not?

A. Yes. Well, it was after the passage of the ordinance, and after the collection of one years' interest on the bonds.

Q. I want to ask you a little about something else. It is now about twelve o'clock.

Adjourned until 2 P. M., December 1, 1909.

89 PORTLAND, ORE., December 1, 1909—2 p. m.

Mr. FENTON: I would like to withdraw Mr. Gaston for the present, and put Mr. Cotton on the stand.

W. W. COTTON, a witness called on behalf of complainant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Cotton, you are Secretary of the Oregon & California Railroad Company, I believe?

A. Yes, sir.

Q. I show you a book entitled "Journal of Minutes Oregon Central Railroad Company No. 4," and beginning with the middle of Page 75 down to the middle of Page 99, and all the pages of the book between those places, the first beginning with the word—"The Secretary then read the following communication from the President of the Oregon & California Railroad Company," ending with the signature of "A. G. Cunningham, Secretary, T. R. Cornelius, President," and ask you first, if that book is the original minute book of the Oregon Central Railroad Company?

A. Yes, sir, it was turned over to me as such, by Mr. Andrews,

my predecessor in the office. I know Mr. Andrew's signature, which appears herein.

Q. Do you remember, or do you recognize the signature of T. R. Cornelius, President?

A. Yes, sir.

Q. And the signature of A. G. Cunningham, as Secretary?

A. No, I do not know.

90 Q. But you do recognize Cornelius' signature as Cornelius' signature?

A. Yes, sir.

Mr. FENTON: I offer these pages indicated, as tending to show the authority to execute the deed of October 6, 1880, and will not take time now to read the papers.

Mr. KAVANAUGH: I would like to ask Mr. Cotton some questions. Where has that book been, Mr. Cotton, since you first received it?

A. It has been in my possession—in a vault in my office.

Mr. KAVANAUGH: You say you are not acquainted with the signature of Mr. Cunningham?

A. No, sir.

Mr. KAVANAUGH: Are you acquainted with the handwriting in which the minutes are written?

A. No, I can't say in whose handwriting it is.

Mr. KAVANAUGH: Was there more than one Oregon Central Railroad Company in this state, that you know of?

A. Not that I know of.

Mr. KAVANAUGH: Wasn't there an Oregon Central Railroad Company that owned the West Side road and a different Oregon Central Railroad Company that owned the East Side Company?

A. There may have been, but I have no present information about it.

Mr. FENTON: I will state, for the information of counsel, if there is any question about these being the minutes of the Oregon Central Railroad Company, that constructed the road on the west side of the river, I promise to identify it with these minutes.

91 There were two Oregon Central Railroad Companies—the Oregon Central of Salem, which constructed the first 25 miles of the East Side road, but it had nothing to do with this.

Mr. KAVANAUGH: I have it mixed up, and could not understand.

Mr. FENTON: That is the way it is. The Oregon Central of Salem that constructed the first 25 miles of the East Side afterwards transferred their interest to the Oregon & California, which continued the road south, but the Oregon Central of Portland, incorporated in 1866, is the road designated in the Act of Congress, and is this road through whose title we claim on the west side.

Mr. KAVANAUGH: Do you know where Mr. Andrews is now?

A. Yes, sir, he is in the City of Portland—Secretary of the Arlington Club; that is, Assistant Secretary.

Mr. KAVANAUGH: That is all.

Mr. FENTON: You have no objection?

Mr. KAVANAUGH: I object to the authentication.

COURT: It will be admitted.

Mr. KAVANAUGH: I will object to it further, but I understood these objections would come in later. I object to it on the ground that it is incompetent, immaterial and irrelevant, and on the further ground that there is no authority of law for making the transfer.

Objection overruled. Exception saved.

Mr. FENTON: Some time during the afternoon I would like to read it into the record, so we can withdraw this book.

Marked Complainant's Exhibit F for identification.

92 Q. I hand you now a book purporting to be minutes of the Oregon & California Railroad Company of date Wednesday, September 8, 1880, and beginning with the words, Page 58—beginning with the words "Office of the Oregon and California Railroad Company," and extending to the words "R. Koehler, President" at the bottom of Page 59, and ask you if that is the minute book of that date and the official record as kept by the Secretary of the Oregon and California Railroad Company?

A. It is one of the official records kept at the office of the Secretary of the Oregon & California Railroad Company. It was turned over to me by Mr. Andrews, my predecessor in office as one of the record books of the company.

Q. Do you recognize the signature of R. Koehler at the bottom of the second page of those minutes, as the genuine signature of R. Koehler?

A. Yes, sir.

Q. You knew his signature and know it now?

A. Yes, sir.

Q. Mr. FENTON: I offer these pages, that is to authorize the proposition to be made the Oregon Central to purchase its property.

Mr. KAVANAUGH: Same objection both as to authority and the other objection.

Objection overruled. Exception saved.

Marked for identification.

93 Mr. FENTON: I will show you Volume 4, purporting to be record of minutes of the Oregon & California Railroad Company, and the pages of this book between Page 31 and Page 344, both inclusive, and ask you if you recognize that as the record of the minutes of the Oregon & California Railroad Company, between the dates named and the pages indicated.

A. Yes, sir, that is one of the books that was turned over to me by Mr. Andrews, and has been kept by me as such, as one of the record books, and I recognize the signatures.

Q. And you recognize the attestation and Secretary?

A. Mr. Koehler and Mr. Andrews, both of them.

Mr. FENTON: I offer these now and ask leave to identify the various places and read them into the record.

Mr. KAVANAUGH: Same objection.

Objection overruled. Exception saved.

Marked for identification.

94 Mr. FENTON: If the Court please, it is out of order, but I desire with the consent of counsel for city to offer in evidence what is called the McCormick map of 1859, showing the situation of the town at that time, and will offer it on the basis of an ancient document. This is the property of F. V. Holman, and is the only one known to be in existence. I desire to offer this and substitute a photographic copy, and to withdraw it at once. I offer this for the purpose of showing the location of Glisan Street on the north as it was in 1869, and the southern boundary of the city.

Mr. KAVANAUGH: No objection.

Court: Have you a photographic copy?

Mr. FENTON: I will have to get a photograph, and I will ask the City attorney to be present when the photograph is made, and will have it marked Plaintiff's Exhibit B.

Here is Carruther's Donation Land Claim on the southern boundary, which was the corporate limits in 1859, the southern limits of the city, and Fourth Street apparently goes into the bend here, and makes an angle there, and this is called South Street. (Indicating on the map.)

Mr. KAVANAUGH: Where is the hollow, Mr. Fenton?

Mr. FENTON: I think it is here, I am not sure of this. What street is this here?

Mr. HIMES: Lincoln Street. The way it runs now, College, Jackson, Lincoln.

Photograph of Holman's Map, marked Complainant's Exhibit B.

95 GEORGE H. HIMES, a witness called on behalf of complainant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Himes, what position do you hold, with reference to the Oregon Historical Society?

A. Assistant Secretary.

Q. Have you in your custody and at my request, have you produced a map of Portland, Washington County, Oregon, purporting to be a copy of the original map of Captain G. O. Travalliot, made by Edward Failing, in 1854?

A. I do, that is the map.

Q. How long have you had that in your custody?

A. Nine years.

Q. Can you give the history of that map, briefly?

A. The history of the map would be best given, I think by simply reading the record on the back of the map, showing how it came into my possession. "Portland, Oregon, 1st August, 1900. Mr. George Himes, Assistant Secretary. With this I send you a map of the City of Portland, Oregon Territory, as it was planned by the owner of the land. This map was drawn in 1854 by my brother, Mr. Edward Failing, and is a copy of the original map drawn by Captain George Travalliot, according to surveys made by himself in 1853." That

96 is the substance of the description. How long have you lived in the City of Portland, or been acquainted with the City of Portland?

A. Ever since March 13, 1864.

Q. Were you here in 1869, and continuously since that time?

A. Yes, sir.

Q. Now, Fourth Street as shown on this map extends on the south to the street called Quick Street. Do you know what street that is now? South of College?

A. No, I do not. It must be Jackson, I would think. That follows College if I remember rightly.

Q. Now, Block 150, shown in colors here—what is that "Sons of Templars"—that is between Fourth Street and Fifth Street and Clay Street and Main Street—no Market Street. Do you know anything about that?

A. I do not.

Q. Apparently that indicates the only thing that has any improvements indicated in this list here on Fourth Street in 1854?

A. That is—I don't know as I understand that now—the Baptist Church? I haven't my glasses.

Q. 62—1, 2, 7, 8. I notice on this picture these words: "Portland, Washington County, Oregon. References—under the title designating lots and blocks—Lyceum, Methodist Church, Baptist Church, Congregational Church," etc. Do those references locate the various things indicated on the map here in colors?

A. They do, as I understand.

Q. This shows Fourth Street as it purports to have been at that time, as you understand?

A. As I understand.

Q. I notice that that shows the addition—John H. Couch's Addition to Portland. Can you tell from that map whether that is from Ankeny Street north of Flanders Street?

A. That is my understanding. The Couch line was A Street.

Q. That is Ankeny Street

A. Ankeny Street, yes, sir.

Q. And this little map here of Couch's Addition, as you understand the land lies on the ground, goes to Flanders Street on the north?

97 A. The property was given to the Baptist Church in either 1854 or 1855. If it is the Baptist Church located there, it should be the corner of Fourth and Alder. That is, the southwest corner of Fourth and Alder.

Q. Fourth and Alder. There it is, Block 62, north half of Block 62?

A. Yes, sir.

Q. Was located there?

A. It was located in 1854, as I understand.

Q. That remained there until when?

A. Until it was sold recently to Henry Failing, by the Baptist Association.

Q. About 1886?

A. I think so. No, it must be a little later than that—within fifteen years, the purchase of that.

Q. 1886 would be 23 years ago.

A. It is later than that.

Q. Later than that?

A. I could not state how late, but the beginning of the building of the church, the White Temple is contemporaneous with the vacation.

Mr. FENTON: I offer this map, and desire to substitute a photograph.

Photograph to be marked Plaintiff's Exhibit C.

Q. What have you there, Mr. Himes?

A. This is a map of the City of Portland, surveyed and drawn by order of the Common Council by Burrage, City Surveyor in 1866, published for the McCormick directory of 1867.

Q. How long has that been in your custody?

98 A. Oh, that has been in my custody, I should say, 35 years—long before the Historical Society was thought of.

Q. Is that what purports to be a map of the City of Portland, surveyed and drawn by order of the Common Council?

A. It was used in the publication of that year of McCormick's Directory.

Q. Is it substantially a correct illustration of the city at that time?

A. So understood.

Q. And recognized by you as such?

A. Yes, sir.

Mr. FENTON: I offer that, and ask to be allowed to substitute a photographic copy of same.

Photographic copy Complainant's Exhibit D.

Q. Now, I will ask you one or two other questions. You have been familiar with this Fourth Street Railway and its operation since you came here in 18—

A. 1864.

Q. On January 6, 1869, the City of Portland passed an ordinance granting to the Oregon Central Railroad Company a franchise to operate its railroad on Fourth Street, from G Street to the southern boundary limits of the city as I remember, and as much further as Fourth Street might be extended north. Were you here when the road was first begun to be operated?

A. I was.

Q. What is the fact as to when you recollect the road was first begun to be operated about when?

99 A. Well, I don't know as I can state specifically the date. It was about—let's see, the 15th of April, I think it was, 1868, when the first ground was broken. South of Marquam's Gulch and very soon after that—

Q. And south of Marquam's Gulch?

A. Yes, sir.

Q. And that was the 15th of April, 1868, when they had the exercises?

A. Yes.

Q. And when, with reference to that, was Fourth Street occupied by the railroad?

A. I think it was within the first year.

Q. You don't remember certainly the date? It was some time soon, within a year or two after that?

A. Yes.

Q. Do you remember how Fourth Street—its condition when the railroad first went on to it, as to whether improved or not?

A. No improvement whatever.

Q. What kind of a street was it?

A. Just an earth street.

Q. What kind of improvements were made by the Railroad Company after they occupied the street, first, as you remember? What kind of grade?

Mr. CAVANAUGH: Objected to.

Objection overruled. Exception taken.

A. I don't know as I could give any testimony on that subject. I hardly—it was simply an earth street. I don't remember any improvement aside from simply the laying of the ties and rails.

100 Q. You don't remember about its having been graded, with planks; planked across all the way, some time afterwards—two or three times?

A. Well, it had plank improvements, as I recollect. Later on, but just when, I could not say.

Q. Now, what is the fact, if you know, about the road having been continuously operated between these points mentioned ever since the time it was first begun to be operated up to the present time?

A. Been operated continuously.

Q. When was the City Hall placed where it is?

A. February—I am not sure exactly, I could give you that date exactly, as far as that is concerned, but I think it is 15 years ago, as a matter of fact.

Q. When was the County Courthouse located on the block where it now is, if you remember?

A. 1864—that is, the ground was purchased in 1864, and the building begun,—

Q. When was the building erected?

A. They began building in 1865.

Q. And finished?

A. Finished in 1866.

Q. Now, do you know what the population of the City of Portland was in 1869, about?

A. Why, approximately, well, the census of 1870 gives the population 8300 and some odd. I will say incidentally, in the picture yonder which I brought—

Q. When you say yonder, which do you mean?

A. The large picture in the corner. That has the data, the exact

number of the population—I placed on a tablet. I placed
101 the exact census of 1870—which is 8300 and some.

Q. I show you a Portland directory, page 10, published for the year 1871, embracing a general directory of the residents—a directory of East Portland, together with a business directory, city charter, and other statistical information relative to property and the city, compiled and published by S. J. McCormick, editor of the Oregon Almanac. Do you recall that publication?

A. Very well.

Q. Was it a standard publication in the city at that time?

A. So considered.

Q. Recognized as authority?

A. It was.

Q. I show you a table of population of Portland, Page 10, and ask you if that table is substantially in accordance with your recollection of the facts, and the best information you had of the population of the city during those years. Before you answer, let the City Attorney see that.

Mr. KAVANAUGH: I would like to interpose a formal objection, as not the best evidence.

Court: Very well.

Exception taken.

A. My impression is—I recall I had a conversation with Mr. McCormick about this time. We discussed this total of 9,565. It was somewhat different from the United States census, but he explained that difference to adding, as he claimed at that time, the floating population, and that is his explanation of the discrepancy in the figures.

102 Mr. FENTON: I will offer this table for what it is worth, if you have no objections.

Mr. KAVANAUGH: No.

Mr. FENTON: I will read it in. "Population of Portland. The following table exhibits the population of Portland during the last ten years and shows a steady growth in every year:

1860.	Total Population	2,917
1862.	" "	4,057
1863.	" "	4,794
1864.	" "	5,819
1865.	" "	6,068
1866.	" "	6,508
1867.	" "	6,717
1868.	" "	7,980
1869.	" "	8,928
1870.	" "	9,565"

Now, your recollection is that the census, the Federal census of 1870 showed a population of how many?

A. 8300 and a fraction.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Speaking of the condition of Fourth Street at the time the grant or attempted grant was made in 1868-1869, January 8th, what was the character of the buildings along the street at that time?

A. Wooden buildings.

Q. Was it thickly built up or sparsely?

A. Sparsely built. I might say, respecting the Courthouse—of course with respect to that particular block, there was one
103 small one-story cottage on that block. The rest of the block was covered—well, there was a number of fallen trees, fifteen or twenty fallen trees. I would not say how many—a number of fallen trees on the block. These were cleared away in order to make room for the site of the courthouse.

Q. I am speaking, Mr. Himes, of a little later than that, 1869, when the road was built—what was there, 1868-'69-'70, along there?

A. Well, there were quite a number of buildings had been erected. There was no business as I remember, or any business buildings on that street.

Q. On Fourth Street?

A. All residence buildings, and there were gaps all the way along, from one street to another, not solidly built out in any way.

Q. I think you said it was an earth street?

A. An earth street.

Q. Any sewers?

A. No sewers.

Q. Or water mains?

A. There probably were water mains—I think there were. I think there were water mains. That is, wooden pipes in the street.

Q. Running along near the curb?

A. Well, I suppose so.

Q. You were quite young at that time?

A. Well, twenty years old.

Mr. FENTON: How old?

A. Twenty years.

Q. You remember the circumstances of the road being built?

104 A. Very well indeed.

Q. And the agitation for the road?

A. I remember it very well indeed.

Q. Do you remember how much bonus the City of Portland paid the company for putting in the road?

A. I am not sure of the exact figures, but I think \$100,000 even money.

Q. There was something done about taking care of some bonds too, wasn't there?

A. That was the talk at the time, but I could not give any testimony about that. I don't know the facts in respect to it—simply what was talked on the street—hearsay.

Q. Do you remember the first type of trains and engines that ran on the road?

A. Well, I don't know that I could—I couldn't describe them technically.

Q. Were they as large as they are now?

A. Not as large as they are now.

Q. Were they half as large?

A. I think they were the customary type of train in use at that day—that is my impression.

Q. How about the coaches—were they as large as the present type?

A. They were not.

Q. Freight train?

A. I think they were very much smaller than now.

Q. Do you know how many trains daily ran on this track at that time?

A. I would say they ran semi-occasionally.

105 Q. Did they run—there was only one train back and forth a day, passenger?

A. One each way.

Q. There were no freight trains at all for a considerable time, were there?

A. Well, I think they probably were not daily, but some freight trains. Possibly one a day. I am not able to state positively about that, however.

Q. Did the dwellings that you spoke of extend down past Washington Street?

A. Yes.

Q. On down towards G Street, as it was known then?

A. Yes.

Q. That made up the residence district?

A. It was scattered all along, I think possibly might have gone a little further than G Street. Might have gone perhaps to, well, perhaps to—

Q. Where was the thickest settled portion of Portland at that time?

A. Well, it was between Stark on the north, and about—well, very little difference, is my judgment and recollection between Stark on the north and Taylor or Salmon—let's see. A little farther south—next would be Main. I think it was uniformly settled all the way from Stark on the north to Salmon on the south. They then began to scatter.

Q. Have you any photograph or cuts of the city about that time that show the houses and buildings along the street?

106 A. I have a large picture or photograph that was taken by a noted photographer of California in 1867, a panoramic view.

Q. Have you any of a later date than that. Wasn't there a picture taken by Joe Buchtel?

A. His picture purports to be taken in 1868. I have that also, but it is very evident that both pictures were taken from the same

point of view, and I am not able to determine any difference between the pictures, if so, very little difference. I have taken these pictures, and compared them by sections, and in each section—I have not counted the buildings in each section, but have counted buildings, for instance, in the southernmost section, and found practically in the Buchtel photograph, the same number as I remember in 1868, that there was in the Watkins photograph of 1867, and very evidently both pictures were taken from the same point, and just where that point was, I am not able to locate.

Q. You don't remember how many buildings show along the street?

A. No, sir, I do not. There is the picture, it will show for itself.

Q. Do you remember any buildings, business buildings along Fourth Street, outside of the Courthouse, and St. — perhaps at St. Mary's Academy?

A. Those two—I don't recall others.

Q. Where was the center of business at that time?

A. Front and Alder Streets.

Q. The wholesale and retail business was conducted there?

A. Right on Front Street—very little business of any kind on First.

Q. Well, Fourth Street was rather a back street then, compared with the business section?

A. Relatively. You can compare Fourth Street then with a street of the same character today—you would have to go back to the foot of the hill—way back. It would be as far out of the way relatively as 25th Street would be to day.

Q. What would be the character and amount of travel in Fourth Street at that time?

A. Very small.

Q. Was it in very bad condition in the winter?

A. It was a quagmire from one end to the other.

Q. Made it almost impossible to haul heavy loads there?

A. Yes.

Q. No pavement?

A. Sidewalks for the most part.

Q. With boards running lengthwise?

A. Boards running lengthwise.

Q. Couple of boards?

A. Two boards; that is, that was the condition in 1868-'67, and I think possibly there were sidewalks running north and south from Fourth—I mean from Washington a short distance.

Q. Regular sidewalks?

A. Regular sidewalks.

Q. Wood sidewalks?

A. Wood sidewalks. Might have been two blocks—maybe three blocks, on both sides—north and south.

Q. Were there stumps or trees or snags along the street?

A. Well, there was not in the heart—not between say, Stark and Yamhill and Taylor—no stumps. Might have been a few small stumps. I think the stumps had been removed.

Q. How far south?

A. Plenty of stumps in the street further south.

108 Q. And how was it north of Stark?

A. Well, I could not speak with any decree of accuracy about that, because I lived in the southern part of the city and had no occasion to go north, except occasionally. I don't know as I could give much more information.

Q. You didn't live on Fourth Street, did you?

A. No, no. In 1869 I was living on Sixth Street, but frequently passed up Fourth Street. In 1869 I was living on Sixth Street between Clay and Market.

Q. Did you ever live on Fourth Street?

A. Never lived on Fourth Street.

Q. Did you ever have an office there?

A. Never did.

Q. Your office now is on Fifth is it not?

A. Well, in the City Hall.

Q. Near Fifth?

A. My office now as Secretary of the Historical Society is on Fifth Street, or between Fourth and Fifth, between Madison and Jefferson.

Q. At what corner of the building?

A. Northwest corner.

Q. Northwest corner. How far are you from this track, in your office?

A. Just one block. That is, the track is on the east side of the City Hall, and my office is on the west side of the City Hall.

Q. Do you feel any vibration of the office there when the train passes?

A. The jar, very distinctly. Well, I might say—I said my office is in the northwest corner, but the office of the Historical
109 Society in the City Hall extends from the west side clear to the east side, and my own private rooms are mainly on the east side of the street, and next to the corner.

Q. Some distance from the street?

A. Oh, yes, it is back 50 feet from the street.

Q. Does it jar the building considerably?

A. Yes, very perceptibly.

Q. How about the noise? Do you hear the noise distinctly?

A. I do.

Q. Is it difficult to carry on a conversation when the train passes?

Mr. FENTON: I think that calls for a conclusion, your Honor.

Court: I suppose he can state.

A. Well, we generally have to stop.

Q. How often do they pass that way in a day?

A. Well, it is going and coming all the time. I couldn't, of course, keep tab on the number, but a great many trains.

Q. Have you ever been in the council chamber during a session when a train passed?

A. No, I think not.

Q. Or in any of the public business meetings there when a train passed?

A. Yes, I have.

Q. They had to stop, didn't they, until the train passed?

A. Well, they had to stop; that is, if you wanted to catch all that was being transacted—all the business that was being transacted.

Q. Have you a picture of Mr. Buchtel's here?

110 A. I have a picture of Mr. Watkins' here, which was substantially the same—a year prior to that of Mr. Buchtel.

Q. What year?

A. 1867.

Q. 1868 was Buchtel's?

A. A panoramic picture, but according to the comparisons I have made—

Q. They are very much the same?

A. —the pictures I think are exactly duplicates, and the other was hanging on the wall, and rather difficult to get at, and because I consider—in looking at the two, I believed they were exactly duplicates.

Mr. FENTON: I did not know you had this here.

A. I have not had this one very long.

Q. It is the other one I want. If this is the same—I didn't know. You identify this picture as the one in your possession for some time?

A. Yes, sir.

Q. Where did you secure this, Mr. Himes?

A. I got this picture from—I am a little bit in doubt as to where we did secure it, but my recollection is that I secured this from Mrs. Schwab, Mrs. R. M. Schwab.

Q. Mr. Himes, can you identify Fourth Street on this picture?

A. Yes, sir, here it is—here is the Courthouse. The Baptist Church here, Fourth and Alder. (Indicating on picture.)

Q. Where is G Street?

A. G Street would be way down—let me see. Well, G Street—here is Sixth; that is the corner of First and Alder there. Here is where the Hotel, Portland now stands. This is the Oregonian Building. This is Sixth Street right on down. These buildings in there—G Street would be along in there. There is no 111 buildings that I remember standing on G Street that are standing now. There might have been on G Street, but none of them that I can locate definitely. There was a building located down here among this oak timber. You see right along in there is where the Union Depot is today, and there was one building that possibly might be one that somebody could recognize in here, but it didn't happen to be my habit to visit that building very often. It was a distillery owned by L. M. Starr. There are people in the city that can possibly locate that building in that picture.

Q. Now, Mr. Himes, this street running way out here—

A. Here is one building—here is Fourth Street.

Q. Here is Fourth Street—this is it right here. Here is Mar-

quam's Gulch runs down this way—down along that line to this point. Then along here, right along through there.

A. Here is the Plaza block, right there.

Q. Here is the Courthouse, and on down to there—

A. —and then of course, this probably would be G Street along in there. It was taken in 1867.

Q. 1867?

A. Yes. Here is the Watkins picture. I knew him quite well. He came up here through a contract he made with the O. R. & N. Company—I don't mean that—he took a lot of pictures of the Columbia River. Many of these pictures are still in existence. These were taken at the same time. He was a noted scenic photographer, and the most noted one on the Pacific Coast at that time.

Q. The street out in the southern portion here was not 112 graded, was it?

A. No.

Q. What was the condition of Fourth Street two years later, or approximately two years later, as compared with then? Were there many changes?

A. Very little.

Q. I mean January 6, 1869.

A. Well, I will explain that by relating the comparison between this picture taken in 1867, and the Buchtel picture taken in 1868. I have compared both of these so far as buildings are concerned, and they are absolutely the same, the same number of buildings in the Buchtel picture of 1868 as in this picture of 1867. I have counted and made comparisons, and taken measurements. I saw Mr. Buchtel today, and asked if he could remember where he took this picture from. He didn't know, but thought it was what used to be Robinson's hill. I said: "You took it from the same place as Mr. Watkins' picture, because Watkins' takes in this picture and takes in Ross Island." It was taken in the month of June when high water was in operation and it shows this water here between the main body of the river back of the river—and Uncle Jimmy Stevens' house.

Q. Where is the levee on this?

A. On this map?

Q. It would be right in here.

A. I will show you in just a minute. There is Madison Street right here—Jefferson Street here.

Q. The courthouse would be in here. That would be the largest building in town at that time?

A. Most important in town, by all odds.

Q. What is this here?

113 A. St. Mary's Academy, and that building there was Vaughn's Flouring Mill, corner of Front and Madison.

Q. Where was John C. Ainsworth's residence, Fourth and Oak?

A. That is it there.

Q. Was on Fourth and Oak?

A. No, Third.

Q. Third and Oak?

A. Here is Third and Washington right here. That is the First Presbyterian Church, and I think Mr. Ainsworth's house is right in there.

Q. What old families lived on Fourth Street—do you remember?

A. No, I do not. R. R. Thompson and Captain Ankeny lived down in that locality, but I don't remember just what streets they lived on. With the exception of Ainsworth's house—I remember that very well. This house here, I think that was the house owned by Arthur Fahie. He is the father-in-law of Mark O'Neil today.

Q. Which side of Fourth Street?

A. East side.

Q. Where was Marquam's Gulch?

A. Here. Here is Harrison Street too. There is a deep gorge about 50 feet deep.

Q. I understand you to say that the general conditions here were about the same in the early part of 1869 as they were at this time.

Mr. CAVANAUGH: I will offer this in evidence with the same provision as to substituting photographs.

Photograph of Watkins' Map, Defendant's Exhibit 1.

114 Redirect examination:

Q. This jarring of the City Hall is the ordinary jarring that any engine or train would make on a street adjoining a building, isn't it?

A. I think so.

Q. You notice the jarring of a carriage going in front of a residence?

A. Yes.

Q. Where they drive heavy?

A. Yes.

Q. You have known of no buildings falling down by the operation of that train on Fourth Street?

A. Never have.

Q. No damage to any buildings, so far as you know?

A. None that I am aware of.

Q. Mr. FENTON: I offer in evidence, while on this subject, Section 1 of the Act of October 14, 1864. I think I will offer in evidence the entire Act of the Legislative session, pages 3 to 29 of the Session Laws for that year, and will ask leave to submit it to the reporter. Volume 64 is a very scarce volume. Col. Smith has the only one in town, I think. This is a copy of it offered for the purpose of indicating the bounds of the City of Portland as it was in 1864.

Marked Plaintiff's Exhibit E and read in evidence as follows:

Witness excused.

*Special Laws.***An Act to Incorporate the City of Portland.**

Be it enacted by the Legislative Assembly of the state of Oregon:

CHAPTER I.*Of the Boundaries and Incorporation of the City.*

- SECTION 1. Boundaries of the city includes Caruthers' Addition.
2. Incorporation of city; name and style of.

SECTION 1. The city of Portland is bounded as follows: commencing at the southwest corner of the donation land claim of Finice Caruthers, deceased; thence running easterly following the southern side line of said land claim to the bank of the Willamette River, at the southeast corner of said land claim; thence continuing such easterly course, on a projection of such line, to the centre of the Willamette River; thence northerly down the centre of said river, until it shall intersect a projection of the north side line of the claim known as the land claim of John H. Couch; thence westerly on such last named projection to the northeast corner of such Couch land claim; thence following such north line of such Couch claim, or a projection thereof, seventy chains; thence southerly, in a direct line to the place of beginning.

SEC. 2. The inhabitants of the city of Portland, are hereby constituted and declared to be a municipal corporation, by the name and style of the city of Portland, and by such name, shall
116 have perpetual succession, sue and be sued, plead and be impleaded, in all courts of justice, and in all actions, suits or proceedings whatever; may purchase, hold and receive property, both real and personal, within said city for public buildings, public works and city improvements; may lease, sell or dispose of the same for the benefit of the city; may purchase, hold and receive property, both real and personal, beyond the limits of the city, to be used for burial purposes; for the establishment and maintenance of a hospital, for the reception of persons affected with contagious or other diseases; for work houses, and for houses of correction; also for the erection of water works to supply the city with water, and may control, lease, sell or dispose of the same for the benefit of the city; and they shall have and use a common seal, and may alter and break the same, or make a new one at pleasure.

CHAPTER II.

Of the Government of the City.

- SECTION 3. Power of corportion vested in mayor and council.
4. Number of wards and boundaries thereof.
 5. Representation of ward in council.
 6. Term of members of council.
 7. Term of mayor.
 8. Judicial and administrative offices.
 9. Who eligible to office.
 10. Who eligible to the office of councilman.

SECTION 3. The power and authority given to the municipal corporation of the city of Portland, by this act, is vested in a
117 mayor and common council, and their successors in office, to be exercised in the manner hereinafter prescribed.

SEC. 4. For the purposes of municipal representation, the city of Portland is hereby divided into three wards, designated and bounded as follows: Ward number one, which includes all that part of such city, north of Washington street; ward number two, which includes all that part of the city, between Washington and Main streets; and ward number three, which includes all that part of the city south of Main street; and the council, by ordinance, may create additional wards, or change the boundaries of those herein established; but the dividing line thereof, must be on the centre of streets, running at right angles to the Willamette river.

SEC. 5. Each ward herein established, and any additional ward that may hereafter be established, is entitled to elect three members of the common council.

SEC. 6. The members of the common council shall be elected for three years, and shall hold their offices until their successors are elected and qualified.

SEC. 7. The mayor shall be elected for two years and shall hold his office until his successor is elected and qualified.

SEC. 8. There shall be elected as hereinafter provided a recorder, treasurer, assessor, auditor, attorney, street commissioner, surveyor and marshal, who shall be officers in this municipal corporation. The recorder, treasurer, and assessor, shall be elected for two years by the qualified voters of this corporation, as hereinafter provided, and shall hold their offices until their successors are elected
118 and qualified, and the marshal, attorney, street commissioner, surveyor and auditor, shall be elected by the common council, the votes of a majority of all the members then constituting the council being necessary to elect, and they shall hold their offices until their successors are elected and qualified, liable, however, to be removed at any time, by the mayor and council for misfeasance, inattention or incompetency.

SEC. 9. No person is eligible to any office in this municipal corporation, who at the time of his election or appointment is not entitled

to the privilege of an elector, according to the constitution of this state, and who has not resided in the city of Portland for the three months next preceding such election or appointment.

SEC. 10. In addition to the qualifications prescribed in section 9, to be eligible to the office of councilman, a person must be a resident of the ward from which he is elected.

CHAPTER III.

Of Elections.

SECTION 11. General elections on third Monday of June annually.

12. When officers to be elected.
13. Judges and clerks of election and place of voting.
14. Notice thereof to be given by the auditor.
15. Qualification of voters.
16. What officers elected from the city and what from the wards.
17. Election to continue; vacancy in office of judge or clerk of election.
- 119 18. Qualifications of judges and clerks, errors and mistakes not to vitiate election.
19. Returns of the election, to whom made, and by whom canvassed.
20. Canvass, what to contain and with whom filed.
21. Auditor to issue certificate of election.
22. Effect of certificate, council to decide contest for the office of mayor or a seat in council.
23. Contested elections in other cases, how decided.
24. Term of office, when to commence, effect of not qualifying in time.
25. Oath of office, and with whom filed.
26. Election laws of state to apply, how far.

SECTION 11. There shall be a general election in the city of Portland, on the third Monday of June annually.

SEC. 12. All officers required to be elected by this act, except those elected by the common council, shall be elected by the qualified voters of the city or ward, as the case may be, at the general election, next preceding the expiration of the term, of the then incumbent of the office.

SEC. 13. The council shall designate one place in each ward for holding the election therein, and appoint three judges, and two clerks of election for each ward.

SEC. 14. The auditor, under the direction of the council, shall give ten days' notice by publication in some daily newspaper published in the city of Portland, of each general election, the officers to be elected thereat, and the place designated in each ward
120 for holding the election therein, and the judges and clerks appointed to conduct the same.

SEC. 15. No person is qualified to vote at any election under this act, who does not possess the qualifications prescribed in section 9, and who has not resided in the ward in which he offers to vote for the ten days next preceding such election.

SEC. 16. The mayor, recorder, treasurer and assessor shall each be elected by the qualified voters of the city, and the councilmen by the qualified voters of the ward from which they are chosen.

SEC. 17. All elections shall commence at 9 o'clock A. M., and continue until six o'clock of the same day, without closing the polls. If any judge of election fails to attend and serve at the proper time, the voters of the ward, then present may elect another in his place, and if any clerk of election fails to attend and serve at the proper time, the judges of the election may appoint another in his place.

SEC. 18. Judges and clerks of election must possess the qualifications of voters in the ward where they act as such, but a mistake or error in this respect, or a failure to give the notice required by section 14, shall not invalidate any election otherwise legal.

SEC. 19. On or before the second day after the election, the returns thereof, from each ward, must be filed with the auditor, and on the fourth day after the election, or sooner, if the returns from all the wards are in, the auditor shall call to his assistance,
121 the county clerk of the county of Multnomah, and a justice of the peace resident in Portland, and they three shall then canvass the returns of the election.

SEC. 20. A written statement of the canvass shall be made and signed by the canvassers or a majority of them and filed with the auditor, within the time appointed to complete the canvass. Such writing must contain a statement of the whole number of votes given at such election, the number given for any person for any office, and the names of the persons elected and to what office.

SEC. 21. Immediately after the completion of the canvass, the auditor must make and sign a certificate of election, for each person declared thereby to be elected, and deliver the same to him on demand.

SEC. 22. A certificate of election is primary evidence of the facts therein stated; but the council is the final judge of the qualification and election of the mayor and its own members, and in case of a contest between two persons claiming to be elected thereto, must determine the same.

SEC. 23. A contested election for any other office than that of mayor or councilmen, must be determined according to the law of the state, regulating proceedings in contested elections in county offices.

SEC. 24. The term of office of every person elected to office, under this act, shall commence on the tenth day after the election at which he was elected, and terminate accordingly, except as otherwise provided in this act; and by such time, such person must qualify therefor by taking and filing the oath of office, and giving such
122 official undertaking for the faithful performance of his duties as may be required, or he shall be deemed to have declined and the office considered vacant.

SEC. 25. All officers elected under this act, before entering upon the duties of their office must take and file with the auditor an oath of office to the following effect:

"I, A. B. do solemnly swear (or affirm) that I will support the constitution of the United States and of this state, and that I will, to the best of my ability, faithfully perform the duties of the office of —, during my continuance therein. So help me God."

If the person affirms instead of the last clause, there must be added: "and this I promise under the pains and penalties of perjury."

SEC. 26. All laws of this state regulating and governing general elections, and proceedings and matters incidental thereto, shall apply to and govern elections under this act, except as herein otherwise provided.

CHAPTER IV.

Of Vacancies in Office.

SECTION 27. Vacancy, how caused.

28. Vacancy, how filled.

29. Officer appointed to fill a vacancy, when to qualify.

SECTION 27. An office becomes vacant upon the death or resignation of the incumbent. The office of mayor, treasurer or
123 assessor, shall be deemed vacant, whenever the incumbent thereof, shall be absent from the city for the period of sixty days. The office of recorder shall be deemed vacant, whenever the incumbent shall be absent from the city for the period of ten days. The office of councilman shall be deemed vacant whenever any incumbent thereof, shall cease to be a resident of the ward, which he represents, or shall fail to attend six consecutive regular meetings of the council, unless absent upon leave of the council, first obtained; but a change of the boundaries of any ward, shall not be deemed to change the residence of any councilman, so as to create or cause a vacancy in such office.

SEC. 28. A vacancy in any office, caused by a failure of the person elected to qualify therefor as prescribed in section 24, or made by or consequent upon the judgment of any court, or in any of the cases specified in section 27, must be filled as follows:

1. In the office of mayor or councilman, by the appointment of the council, to continue until the tenth day after the next general election, and if the term of such office does not then expire, the remainder thereof shall be filled by election, at such general election;

2. In the office of recorder, treasurer or assessor, by the appointment of the mayor, by and with the advice and consent of the council, to continue during the remainder of the term.

SEC. 29. An officer appointed to fill a vacancy, must within five days from the date of such appointment qualify therefor, as in a case of an officer elected, or he shall be deemed to have declined and the office to be considered vacant.

CHAPTER V.

Of the Organization and Powers of the Council.

SECTION 30. Meetings of the council, mayor may call them together.

31. Majority to constitute quorum, less number, power of.

32. Journal of council, yeas and nays.

33. Council may punish or expel members.

34. Mayor president of council, power as such.

35. Regular meeting of the council, tenth day after election.

36. Majority of council, what constitutes, necessary to the passage of ordinance.

37. Style of ordinance.

38. Power and authority of council.

39. Must be exercised by ordinance, unless, &c.

SECTION 30. The council must provide for the time and place of its regular meetings, at any of which it may adjourn to the next succeeding regular meeting or to some specified time, prior thereto, and it may be convened by the mayor at any time, upon not less than two days' notice by publication in some daily newspaper published in the city of Portland.

SEC. 31. A majority of the members of the council shall constitute a quorum to do business, but a less number may meet and adjourn from time to time, and compel the attendance of absent members.

SEC. 32. The council may adopt rules for the government of the conduct of its members and its proceedings. It must keep a journal of its proceedings, and on the call of any two of its members, 125 must cause the yeas and nays to be taken and entered on its journal, upon any question before it; but upon a question to adjourn, the yeas and nays shall not be taken, unless upon the call of four members. Its deliberations and proceedings must be public.

SEC. 33. The council may punish any member for disorderly or improper conduct at any meeting, or for refusing or neglecting to attend any regular meeting without sufficient excuse therefor, and may by a two-thirds vote expel a member.

SEC. 34. The mayor is ex-officio president of the council and presides over its deliberations, when in session. He is not entitled to vote, but has authority to preserve order, enforce the rules of the council and determine the order of business, subject to such rules, and to an appeal to the council. If the mayor should be absent at any meeting of the council, the council must appoint one of their own members president, to serve during the meeting or until the mayor attends.

SEC. 35. On the tenth day next following any general election there must be a regular meeting of the council and such meeting is

appointed by this act, and no notice thereof or call therefor, is necessary.

SEC. 36. A majority of the whole number constituting the council, as then provided by law, is a majority of the council or members thereof, within the meaning of this act, and not otherwise, unless expressly so provided. The concurrence of a majority of a quorum is a sufficient majority to determine any question or matter, 126 other than the final passage of an ordinance.

SEC. 37. The style of every ordinance shall be "The city of Portland does ordain as follows:"

SEC. 38. The council has power and authority within the city of Portland:

1. To assess levy and collect taxes for general municipal purposes, not to exceed one half of one per centum, upon all property, both real and personal, which is taxable by law for state or county purposes.

2. To license, tax and regulate auctioneers, taverns, hawkers, peddlers, brokers, pawn-brokers, and all offensive or noxious trades or occupations.

3. To license, tax and regulate hacks, cabs, hackney carriages, wagons, carts, drays or other vehicles, and to fix the rates thereof.

4. To license, tax, regulate and restrain bar rooms, drinking shops, theatrical and other exhibitions, shows, public amusements, steamboat runners, billiard tables and bowling alleys, and to suppress bawdy houses, gaming and gambling houses, provided, that no law or part thereof authorizing any tribunal or officer of Multnomah County, to grant tavern or grocery licenses, shall apply to persons vending liquors within the city of Portland.

6. To make regulations to prevent the introduction of contagious diseases into the city; to remove persons affected with such diseases therefrom to suitable hospitals provided by the city for that purpose; to secure the protection of persons and property therein, and to provide for the health, cleanliness, ornament, peace and good order of the city.

- 127 7. To prevent and remove nuisances.

8. To provide the city with good and wholesome water, and for the erection, or construction of such water-works and reservoirs, within or without the limits of the city, as may be necessary or convenient therefor.

9. To provide for lighting the streets and furnishing the city with gas or other light, and for the erection or construction of such works as may be necessary, or convenient therefor.

10. To provide for the support, restraint and employment of vagrants and paupers.

11. To provide for the prevention and extinguishment of fire, and for the preservation of property endangered thereby, and for the appointment of officers required for such purposes.

12. To establish and maintain a day and night police, or either of them.

13. To provide for the prevention and removal of all obstructions

from the streets cross and sidewalks, and for the cleaning and repairing the same.

14. To provide for the prevention and removal of obstructions in the Willamette River, within the limits of the city.

15. To assess and collect harbor dues from all vessels and steamboats or other watercraft, whatever arriving at, or departing from the city.

16. To license and tax wharfingers.

17. To provide for the establishment of market houses and places, and to regulate the location and management of market houses, places and slaughter houses.

18. To provide for the erection of a city jail house of correction, and workhouse, and the government and management of the same.

19. To regulate the storage and sale of gunpowder or other combustible material, and to prevent by all possible and proper means, danger or risk of injury or damage by fire, arising from carelessness; negligence or otherwise.

20. To restrain and punish any disturbance or any unlawful or indecent practice.

21. To establish and regulate the fees and compensation of all officers of this municipal corporation, except when otherwise provided.

22. To provide for the punishment of a violation of any ordinance of the city, by fine or imprisonment, not exceeding one hundred dollars or twenty days or both, or by a forfeiture or penalty not exceeding two hundred dollars, and for working any person sentenced to such imprisonment upon the streets or public squares during the term thereof.

23. To levy and collect a special tax of one per centum upon all the property assessed by authority of the first sub-division of this section, for any specific object within the authority of this municipal corporation, including the payment of any existing debt, but the ordinance providing therefor, must specify the object thereof, and the estimated amount necessary therefor.

24. To borrow money on the faith of the city or loan the credit thereof, or both.

25. To appropriate money to pay the debts, liabilities and expenditures of the city or any part or item thereof, from any fund applicable thereto.

26. To provide for a survey of the blocks and streets of the city, and for marking and establishing the boundary line of such blocks and streets.

27. To exercise such power and authority as may be given to the council elsewhere in this act.

SEC. 39. The power and authority given to the council, by section 38, can only be enforced or exercised by ordinance, unless otherwise expressly provided; and a majority of the council may pass any law not repugnant to the laws of the United States or of this state, necessary or convenient for carrying such power and authority, or any part thereof into effect.

CHAPTER VI.

The Mayor, His Power and Duties.

SEC. 40. Mayor to communicate to council.

41. To take and approve official undertakings.

42. Other duties.

43. Ordinance not to take effect until approved by the mayor.

44. Manner of approval.

45. Ordinance if not approved or returned in ten days to become a law.

46. Consideration of ordinance after veto of the mayor.

47. Recorder to be acting mayor during disability of the mayor.

SECTION 40. The mayor is the executive of the municipal corporation, and must exercise a careful supervision over its general affairs and subordination officers. It is his duty annually at the
130 regular meeting of the council appointed by this act, to communicate, by message to the council, a general statement of the condition and affairs of this municipal corporation, and to recommend the adoption of such measures as he may deem expedient and proper; and to make such special communications to the council from time to time as he may think proper and useful.

SEC. 41. The mayor shall take and approve all official undertakings, which the ordinances of this city may require any officers to give as a security for the faithful performance of his duty, or any undertaking which may be required of any contractor for the faithful performance of his contract, and when he approves such undertaking, he must immediately file the same with the auditor.

SEC. 42. He shall perform such other duties and exercise such other authority as may be prescribed by this act, any city ordinance or any law of the United States or of this state.

SEC. 43. No ordinance passed by the council shall go into force or be of any effect until approved by the mayor, except as provided in sections 44, 45 and 46.

SEC. 44. Upon the passage of any ordinance, the enrolled copy thereof, attested by the auditor, shall be submitted to the mayor by the auditor, and if the mayor approve the same, he shall write upon it approved, with the date thereof, and sign it with his name of office, and thereupon, unless otherwise provided therein, such ordinance shall become a law, and be of force and effect.

SEC. 45. If the mayor do not approve of an ordinance so
131 submitted, he must within ten days from the receipt thereof, return the same to the auditor, with his reasons for not approving it, and if the mayor do not so return it, such ordinance shall become a law, as if he had approved it.

SEC. 46. Upon the first meeting of the council after the return of an ordinance from the mayor not approved, the auditor shall de-

liver the same to the council with the message of the mayor, which must be read, and such ordinance shall then be put upon its passage again, and if two-thirds of all the members constituting the council as then provided by law vote in the affirmative, it shall become a law, without the approval of the mayor and not otherwise.

SEC. 47. During any temporary absence of the mayor from the city, or if he be unwell or for any reason unable to act, the recorder shall be the acting mayor, and perform all the duties of such office during such temporary absence or disability, except as otherwise provided in this act.

CHAPTER VII.

Of the Powers and Duties of the Officers of the Incorporation.

SECTION 48. Recorder a judicial officer, style of his court.

49. Has jurisdiction of crimes, forfeitures, or penalties, provided by ordinance.

50. Has the jurisdiction of a justice, and subject to same laws.

51. Procedure, same as in justices' courts.

52. Treasurer to receive and pay out money on warrant.

53. To keep account with general or special funds.

54. Treasurer to report quarterly, reports to be published.

55. Assessor to make annual assessments.

56. Person aggrieved may apply to Council to correct assessments.

57. Manner and time of making assessment.

58. Marshal to execute process and attend Recorder's court and council.

59. Marshal may appoint deputies, and must make arrests.

60. Marshal to exercise control, and be keeper of prison, and collect delinquent taxes.

61. The street commissioner.

62. Attorney, duties of.

63. Auditor, general character and duties of.

64. Demands to be audited by auditor, and reported to council.

65. Council to determine whether demand to be paid or not.

66. When and how warrant drawn for the payment of demand.

67. Auditor, official name of, to keep journal and books and papers of council.

68. Auditor must issue licenses.

69. Auditor must keep account of appropriations and warrants thereon, and other matters.

70. Official books and papers to be delivered to successor.

71. Fees and compensation of officers.

72. Other duties may be required of officers by ordinance.

- 73. Official books and papers may be inspected.
- 74. Auditor may administer oaths.
- 75. Recorder must keep account of forms and costs, and pay to treasurer.
- 76. Recorder, payment of his fees, in proceedings for violation of ordinance.

133 **SECTION 48.** The recorder is the judicial officer of the corporation, and shall hold a court therein, which shall be known as "The recorder's court for the city of Portland."

SEC. 49. The recorder has jurisdiction of all crimes defined by any ordinance of the city of Portland, and of all actions brought to enforce or recover any forfeiture or penalty declared or given by any such ordinance.

SEC. 50. The recorder has the jurisdiction and authority of a justice of the peace for the county of Multnomah, within the limits of the City of Portland, in both civil and criminal matters, and shall be subject to all the general laws of the state prescribing the duties of a justice of the peace, and the mode of performing them.

SEC. 51. All civil or criminal proceedings before the recorder or in the recorder's court, including all proceedings for the violation of any city ordinance, are governed and regulated by the general laws of the state applicable to justices of the peace, and justices' courts in like or similar cases.

SEC. 52. The treasurer is receiver of taxes, and must receive and keep all moneys that shall come to the city by taxation or otherwise, and pay out the same upon the warrant of the Mayor, attested by the auditor.

SEC. 53. The treasurer must keep an account with the general fund, and a separate account with each special fund that may be raised for any specific object, and when a warrant is drawn on any particular fund, it can only be paid out of such fund.

SEC. 54. The treasurer must make a report of the receipts and expenditures for the quarter ending the last day of March,
134 June, September and December, and file the same with the auditor within five days from the expiration of such quarters respectively, which reports must be published by the auditor, as may be prescribed by ordinance.

SEC. 55. The assessor must annually make a correct list of all the property subject to taxation by the city of Portland, with the valuation thereof, and certify and return the same to the auditor.

SEC. 56. A person deeming himself aggrieved by any assessment, either in the valuation or listing of the property, may apply in writing to the council, to have such assessment revised, and if the council deem the same erroneous, they must correct it. The party applying for such correction, may be examined as a witness in relation to the matter, if he desire it, or the council require it.

SEC. 57. The assessment of property must be made in the manner prescribed by law, for assessing property for state and county taxes; but the form of the assessment roll, and the rule for ascertaining the ownership of the property, and in whose name it may be assessed,

may be prescribed by ordinance; and the time of making such assessment and the return thereof, and of applying to the council for a revision thereof, must be prescribed by ordinance.

SEC. 58. The marshal is a peace officer, and must execute all process issued by the recorder, or directed to him by any magistrate of this state. He must attend regularly upon the sittings of the recorder's court and the meetings of the council.

SEC. 59. The marshal may, with the approval of the mayor, appoint one or more deputies, who shall possess the same power
135 and authority as himself. He may make arrests for a breach of the peace, or the commission of a crime within the limits of the city with or without warrant, as a peace officer may do under the laws of the State.

SEC. 60. The marshal has and must exercise a vigilant control over the peace and quiet of the city, and he is the keeper of the city prison or house of correction, unless otherwise prescribed by ordinance. He must collect all delinquent taxes and assessments when required by warrant, and pay the same to the treasurer monthly.

SEC. 61. The street commissioner must perform such duties in relation to the improvement, repairing and cleaning the streets, sidewalks, and public grounds, and keeping the same in good order and safe condition, as may be prescribed by ordinance.

SEC. 62. The city attorney must attend to all actions, suits or proceedings in which the city is legally interested, and attend to the prosecution of all persons charged with the violation of a city ordinance, and give his advice and opinion in writing concerning any matter in which the city is interested, when required by the mayor or council.

SEC. 63. The auditor is the accounting and clerical officer of the city. He is the clerk of the Council, and by ordinance may be required to act as clerk in the recorder's court.

SEC. 64. All demands and accounts against the city must be presented to the auditor, with the necessary evidence in support thereof, and he must audit the same, and report them to the council with all convenient speed, together with any suggestions or explanations
which he may deem proper and pertinent.

136 SEC. 65. When a demand or account has been reported to the council by the Auditor, they must examine the same if they deem it necessary, and by a direct vote whether the same shall be paid or any part thereof, as they may deem it just and legal.

SEC. 66. When the council orders any demand or account to be paid, if money has been appropriated for that purpose, and not otherwise, the auditor must draw a warrant upon the treasurer for the amount ordered paid, which warrant must be drawn on the special or general fund appropriated therefor, and be signed by the Mayor and be attested by the auditor.

SEC. 67. The auditor's name of office, whether acting as auditor or clerk of the council is "auditor and clerk of the city of Portland". It is his duty, under the direction of the council, to keep a fair and correct journal of its proceedings, and to file and keep all papers and books connected with the business of the council.

SEC. 68. He must issue all licenses authorized by city ordinance, upon the delivery to him of the receipt of the treasurer for the amount of money required for such license.

SEC. 69. The auditor must keep proper books of account, showing therein all sums appropriated, the date thereof, and out of what fund; the date and amount of all warrants drawn thereon and to whom payable, and all such other matters and things as may be prescribed by ordinance, or proper and necessary to a correct understanding of the city finances.

SEC. 70. The official books and papers of all the officers
137 mentioned in this chapter, are city property, and must be kept as such by such officers during their continuance in office; and then delivered to their successors.

SEC. 71. The marshal and recorder, when acting under or enforcing the laws of the State, shall be entitled to the same fees and compensation as a constable and justice of the peace for like services, and such compensation for other services as may be prescribed by ordinance. All other officers mentioned in this chapter shall receive such fees and compensation as may be prescribed by ordinance.

SEC. 72. The duties of the surveyor shall be provided by ordinance, and other duties not inconsistent with this act may be required of any officer mentioned in this chapter, by ordinance.

SEC. 73. The official books and papers of any officer mentioned in this chapter, may be inspected at any time by a committee of the council appointed for that purpose, or by the mayor.

SEC. 74. The auditor is authorized to administer any oath authorized or required to be taken by any law of this state or city ordinance.

SEC. 75. The recorder must keep a proper account of all fines, costs, or other moneys received by him or paid into his court, when not acting as justice of the peace.

SEC. 76. The recorder must pay to the treasurer monthly, all moneys mentioned in section 75, and take duplicate receipts therefor, one of which he must immediately file with the auditor.

SEC. 77. Any fees or costs earned or due the recorder or marshal
138 on account of proceedings before him or in his court, when not acting as justice of the peace, must be paid by the city. The recorder and marshal must each make out a monthly account of such fees or costs, and deliver to the auditor, and the auditor must audit the same, and if found correct, it must be paid as other accounts and demands against the city.

CHAPTER VIII.

Of Streets, Their Grade and Improvement.

SECTION 78. Council has power to establish grade of and improve streets.

79. Notice of grade or improvement must be given.

80. Notice by whom given, and what to contain.

81. Remonstrance against grade or improvement, how and when made, and effect of.

82. If no remonstrance, may proceed within six months.
83. Grade, how established.
84. Council to ascertain cost of improvement and make assessment therefor.
85. Probable cost of improvement to be declared by ordinance, and entered on docket.
86. Docket of city liens, what must contain.
87. Docket a public writing, assessments entered therein, a lien.
88. How ownership of lots assessed to be ascertained.
89. Notice of assessments, how given, and contents thereof.
90. When and to whom warrant may issue for the collection of assessments.
91. Directions and requirements of the warrant.
92. Warrant to have force and effect of execution, how executed.
93. Deed to be made to purchaser, and redemption.
94. Redemption, how made.
95. Effect of redemption by owner or creditor.
96. Redemption, how enforced.
97. What portion of street lot liable for the improvement of.
98. Assessment for intersection of streets.
99. Estate or interest conveyed by sale.
100. Payment of delinquent assessment by lien creditor.
101. Manner of making improvement to be prescribed by ordinance, subject to certain restrictions.
- SECTION 102. Deficit in assessment, proceedings in case of.
103. Over assessment, proceedings in case of.
104. Moneys arising from assessments, a separate fund, assessments to bear interest.
105. Improvement or grade may be made without notice when.
106. When street not subject to improvement.
107. Repairing streets.
108. Repairs when deemed improvements, and when not.
109. Cost of grade to be paid from general fund.
110. Disposition of surplus proceeds on sale.
111. Deed to express true consideration, and return to specify amount and name of purchaser.

SEC. 78. The council has power and is authorized, whenever it deems expedient, to establish or alter the grade, and to improve any street or part thereof, now or hereafter, laid out or established within the corporate limits of the city. The power and authority to improve a street, includes the power and authority to improve the sidewalks or pavements, and to determine and provide for

everything convenient and necessary concerning such improvement.

SEC. 79. No grade or improvement mentioned in section 78, can be undertaken or made without ten days' notice thereof being first given by publication in some daily newspaper in the city of Portland.

SEC. 80. Such notice must be given by the auditor, by order of the council, and must specify with convenient certainty the street or part thereof proposed to be improved, or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made.

SEC. 81. Within ten days from the final publication of such notice the owners of two-thirds of the property adjacent to such street or part thereof, as the case may be, may make and file with the auditor a written remonstrance against the proposed improvement, grade or alteration thereof and thereupon the same shall not then be farther proceeded in or made.

SEC. 82. If no such remonstrance be so made and filed, the council at its earliest convenience thereafter, and within six months from the final publication of such notice, may establish the proposed grade or alteration thereof, or commence to make the proposed improvement, as hereinafter provided.

SEC. 83. In the case of a notice to establish a grade or alteration thereof, the council within the time limited by section 82, may establish the same by ordinance as provided in the notice.

SEC. 84. In case the notice be for the improvement of a
141 street or a part thereof, the council may proceed to ascertain and determine the probable cost of making such improvement, and assess upon each lot or part thereof, liable therefor, its proportionate share of such cost.

SEC. 85. When the probable cost of the improvement has been ascertained and determined, and the proportionate share thereof, of each lot or part thereof has been assessed, as provided in section 84, the council must declare the same by ordinance and direct its clerk to enter a statement thereof in the docket of city liens, as provided in the next section.

SEC. 86. The docket of city liens is a book, in which must be entered in pursuance of section 85, the following matters in relation to assessments for the improvement of streets:

1. The number or letter of the lot assessed, and the number or letter of the block in which it is situated, and if a separate assessment is made upon a part of a lot, a particular designation of such part;
2. The name of the owner thereof, or that the owner is unknown;
3. The sum assessed upon such lot or part thereof, and the date of the entry.

SEC. 87. The docket of city liens is a public writing, and the original or certified copies of any matter authorized to be entered therein, are entitled to the force and effect thereof; and from the date of the entry therein, of an assessment upon a lot or part thereof, the sum so entered is to be deemed a tax levied and a lien thereon, which

shall have priority over all other liens or incumbrances thereon, whatever.

142 SEC. 88. For the purpose of ascertaining who is the owner of any lot or part thereof, assessed for the improvement of a street, the auditor shall take the certificate of the county clerk for the county of Multnomah, stating who is the owner thereof, at the date of the ordinance making the assessment, as may appear from the record of deeds for such county, which certificate such county clerk is authorized and required to give, when demanded by the auditor.

SEC. 89. A sum of money assessed for the improvement of a street, cannot be collected, until, by order of the council, ten days' notice thereof is given by the auditor, by publication in a daily newspaper published in the city of Portland; such notice must substantially contain the matters required to be entered in the docket of city liens, concerning such assessment.

SEC. 90. If within five days from the final publication of the notice prescribed in section 89, the sum assessed upon any lot or part thereof, is not wholly paid to the city treasurer and a duplicate receipt therefor filed with the auditor, the council may thereafter order a warrant for the collection of the same, to be issued by the auditor directed to the city marshal, or other person authorized to collect taxes due the city.

SEC. 91. Such warrant must require the person to whom it is directed to forthwith levy upon the lot or part thereof, upon which the assessment is unpaid, and sell the same in the manner provided by law, and to return the proceeds of such sale, less his fees, to the city treasurer and the warrant to the auditor, with his doings endorsed thereon, together with the receipt of the city treasurer, for the proceeds of such sale as paid to him.

143 SEC. 92. Such warrant shall have the force and effect of an execution against real property, and shall be executed in like manner, except as in this chapter otherwise specially provided.

SEC. 93. The person executing such warrant shall immediately make a deed for the property sold thereon to the purchaser, stating therein that the same is made subject to redemption as provided in this chapter. Within three years from the date of such sale, the owner or his successor in interest, or any person having a lien by judgment, decree or mortgage in the property or any part thereof separately sold, may redeem the same upon the terms and conditions provided in the next section.

SEC. 94. Redemption is made by the payment of the purchase money and twenty-five per cent addition, together with interest upon the purchase money, from the date of sale to the time of payment at legal rate, and the amount of any taxes which the purchaser may have paid upon the property.

SEC. 95. A redemption discharges the property from the effect of the sale for the assessment. If made by the owner or his successor in interest, the estate in the property is thereby restored to such owner or his successor in interest, as the case may be; but if made by a lien creditor, the amount paid for the redemption, is

thereafter to be deemed a part of his judgment, decree or mortgage, as the case may be, and shall bear like interest, and may be enforced and collected as a part thereof.

144 SEC. 96. Whenever a purchaser or those claiming under him refuse to convey to a person entitled to redeem, such person may enforce a conveyance therefor by a suit in equity, as for a specific contract to convey real property, and such suit may be maintained against absent parties without proof of tender of the money and an offer to redeem, if the plaintiff bring such money into court and offer then to redeem.

SEC. 97. Each lot or part thereof within the limits of a proposed street improvement, shall be liable for the full cost of making the same upon the half of the street in front of and abutting upon it, and also for a proportionate share of the cost of improving the intersection of two of the streets bounding the block in which such lot or part thereof is situated.

SEC. 98. The probable cost of improving such intersection is to be assessed upon the lots or part thereof situated in the quarters of the four blocks adjoining such intersection, but only upon the lots or parts thereof within the quarters nearest thereto; and in proportion to the cash value of such lots or parts thereof irrespective of improvements thereon.

SEC. 99. A sale of real property under the provisions of this chapter, conveys to the purchaser, subject to redemption, as herein provided, all the estate or interest therein of the owner, whether known or unknown together with all the rights and appurtenances thereunto belonging.

SEC. 100. When an assessment upon any lot or part thereof becomes delinquent, any person having a lien thereon by judgment, decree or mortgage, may at any time before the sale of such
145 lot or part thereof, pay the same, and such payment discharges the property from the effect of the assessment, and the amount of such delinquent taxes and all accruing costs and charges, if any, when so paid is thereafter to be deemed a part of such lien creditor's judgment, decree or mortgage as the case may be, and shall bear like interest, and may be enforced and collected as a part thereof.

SEC. 101. The council must provide by ordinance for the time and manner of doing the work on any proposed improvement subject only to the following restrictions:

1. After proper notice the work must be let to the lowest bidder but a bid by the owner or owners of two-thirds of the property in a block fronting on a street proposed to be improved, must be accepted if as low as any other bid, and the council may provide for the rejection of any or all bids, when deemed unreasonable, and that the bid of any person, who has before bid or contracted for such work and been delinquent therein, shall not be received.

SEC. 102. If upon the completion of any improvement it is found that the sum assessed therefor upon any lot or part, is insufficient to defray the cost thereof, the council must ascertain the defect, and declare the same by ordinance. When so declared, the auditor must

enter the sum of the deficit in the docket of the city liens, in a column reserved for that purpose in the original entry with the date thereof, and such deficit shall thereafter be a lien upon such lot or part thereof, in the manner, and with like effect, as in case of the sum originally assessed, and shall also be payable and may be collected in like manner and with like effect, as in the case of such sum so assessed.

146 SEC. 103. If upon the completion of any improvement it is found that the sum assessed therefor upon any lot or part thereof, is more than sufficient to defray the cost thereof, the council must ascertain and declare the surplus in like manner as in the case of a deficit, when so declared it must be entered, as in case of a deficit in the docket of city liens, and thereafter the person who paid such surplus or his legal representative is entitled to repayment of the same by warrant upon the city treasurer.

SEC. 104. All money paid or collected upon assessments for the improvement of streets shall be kept as a separate fund, and in no wise used for any other purpose whatever: all money so assessed including a deficit from the time of being entered in the docket of city liens, shall bear interest at the legal rate until paid or collected.

SEC. 105. The proceedings authorized by this chapter for the establishment or alteration of a grade or the improvement of a street, or a part thereof, may be taken, and had without giving the notice prescribed in section 79, whenever the owner or owners of two-thirds of the adjacent property, shall, in writing, petition the council therefor.

SEC. 106. When a street, or part thereof, has been once improved under and by virtue of the provisions of this chapter, thereafter such street, or part thereof, is not subject to be again improved, but may be repaired.

SEC. 107. The council is authorized to repair any street or part thereof, whenever it deems it expedient, and to declare by ordinance before doing the same, whether the cost thereof shall be assessed upon the adjacent property, or be paid out of the general fund of the city.

147 SEC. 108. If the council declares that a proposed repair shall be made at the cost of the adjacent property, thereafter the proposed repair is to be deemed an "improvement," and shall be made accordingly; but if it declares that the cost of the same shall be paid out of the general fund, such repairs may be made as the ordinance may provide, and be paid for accordingly.

SEC. 109. The cost of establishing or altering the grade of any street or part thereof, shall be paid out of the general fund of the city. The term general fund as used in this chapter includes any fund raised by special tax for the purpose, in connection with which such term is used.

SEC. 110. Whenever any lot, or part thereof, sold under the provisions of this chapter, shall bring more than the assessment thereon, with interest and costs, and charges of collection, the surplus must be paid to the treasurer, and the person executing the warrant must

take a separate receipt for such surplus and file it with the auditor, on the return of the warrant. At any time thereafter the owner, or his legal representatives, is entitled to a warrant upon the treasurer for such surplus.

SEC. 111. The deed to the purchaser, must express the true consideration thereof, which is the amount paid by the purchaser, and the return of the person executing the warrant, must specify the amount for which each lot or part thereof sold and the name of the purchaser.

CHAPTER IX.

148

Of the Collection of Delinquent Taxes.

- SECTION 112. Tax to be on interest from the time due and payable.
 113. What tax delinquent.
 114. Treasurer to return tax roll to council.
 115. Warrant to collect delinquent taxes, how ordered, and what to contain.
 116. Warrant to have force and effect of execution.
 117. If personal property sufficient be not found, must be levied upon real property.
 118. Real property assessed to an owner unknown.
 119. Delinquent taxes heretofore levied may be collected by warrant.
 120. Deed to purchaser.
 121. Redemption of real property.
 122. Surplus of proceeds of sale, disposition of.
 123. Deed to express true consideration and return to specify amount thereof and name of purchaser.
 124. Return of warrant and costs of executing.
 125. Property subject to sale for taxes.

SECTION 112. Whenever any general, or special tax has been levied as provided and authorized in section 38, every part thereof shall bear interest at the legal rate from the time it is due and payable, until paid or collected.

SEC. 113. The council must provide by ordinance within what time all taxes, levied, as provided and authorized in section 38, may be paid to the treasurer; and all taxes not paid to the treasurer within such time, are hereafter delinquent taxes, and must be collected as such.

SEC. 114. Within five days from the expiration of the time limited for paying taxes to the treasurer, the treasurer must return the tax roll to the council, distinguishing therein the taxes paid and those remaining unpaid.

SEC. 115. The council must thereafter order the auditor to deliver the tax roll to the marshal, and issue and annex thereto, a warrant directed to the marshal, commanding him to proceed and forthwith collect the delinquent taxes upon such roll, in the manner provided by law, and pay the same to the treasurer, less his fees and

costs of collection, and return the warrant with his doings thereon, and the receipt of the treasurer, for all moneys collected thereby, and paid to the treasurer, to the auditor.

SEC. 116. Such warrant for the purpose of collecting such delinquent taxes, shall be deemed an execution against property, and shall have the force and effect thereof, against any person, firm or corporation, against whom such taxes are levied or charged on the tax roll, and shall be executed and returned in like manner, except as in this chapter otherwise provided.

SEC. 117. If no personal property be found whereon to levy the warrant, or if that levied upon be not sufficient to satisfy the same; it must be levied on any real property of the person, firm or corporation against whom the tax is levied or charged, or sufficient thereof to satisfy such warrant, including interest, fees of officer, and all expenses of sale and executing the warrant.

SEC. 118. In case of a delinquent tax levied upon real property in the name of an owner unknown, the warrant shall be executed by levying upon each lot or part thereof of such property, for the tax levied thereon, and selling it separately.

SEC. 119. All taxes heretofore levied by the municipal corporation of Portland, and remaining unpaid, or delinquent, may, by order of the council, be collected from the person, firm or corporation, whether known or unknown, against whom the same were charged or levied, by warrant, in the manner and with the effect provided in this chapter for the collection of delinquent taxes.

SEC. 120. When real property is sold for delinquent taxes, the person executing the warrant must immediately make a deed for such property to the purchaser stating therein that the same is made subject to redemption as provided by law, and such sale shall have the effect prescribed in section 99.

SEC. 121. Real property sold for delinquent taxes as provided in this chapter may be redeemed by the owner or his successor in interest, or by any person having a lien by judgment, decree or mortgage on such property, or any part thereof separately sold, within three years from the date of the deed therefor, and upon the terms and conditions and with the effect provided in chapter VIII of this act, in the case of sale of real property for delinquent assessments for the improvement of streets, and such delinquent tax may be paid by such lien creditor in the same manner and with like effect as a delinquent assessment, as provided in section 100.

SEC. 122. Whenever any property real or personal sold for delinquent taxes shall bring more than the amount of such taxes with interest and the costs and charges of collection, the surplus must be paid to the treasurer, and the person executing the warrant must take a separate receipt for such surplus, and file the same with the auditor on the return of the warrant. At any time thereafter, the owner of the property sold or his legal representative, is entitled to a warrant upon the treasurer for such surplus.

SEC. 123. Section 111 shall apply to the sale of real property for delinquent taxes, and in case of the sale of personal property, for

such taxes the true consideration thereof shall in like manner be expressed in the bill of sale therefor, and the return of the person executing the warrant must specify such consideration and the name of the purchaser.

SEC. 124. The council may provide by ordinance within what time a warrant for the collection of delinquent taxes must be returned, and may order an alias warrant to issue for the collection of any such taxes, not made on a previous one. All costs and charges for collecting delinquent taxes must be made on the warrant, and collected as a part of the tax. The council may prescribe by ordinance the fees and compensation for collecting delinquent taxes, but the same shall in no case be paid out of the treasury.

SEC. 125. All property subject to levy upon execution is subject to levy upon a warrant for the collection of delinquent taxes, and also all property subject to assessment for taxation as provided in section 38, whether the same be exempt from execution or not.

CHAPTER X.

Miscellaneous Provisions.

- SECTION 126. When the city is bound by a contract, and for what amount liable by ordinance.
127. Liability of the city for injuries by casualty or accident.
128. No money to be drawn from treasury except appropriated; ordinance making appropriation what to contain.
- 152 129. Councilmen first elected under this act to draw lots.
130. Member from new ward, elected for what time.
131. Returns and canvass of first election under this act.
132. Members not to be questioned for words uttered in debate.
133. Old officers to continue until first election under this act.
134. Fiscal year, and what rates of taxation to be levied thereon.
135. Limit of indebtedness of the city.
136. Power to improve the navigation of the Willamette River.
137. Power to levy tax for such improvement.
138. General provisions in relation to such tax.
139. Proceedings presumed to be regular, discretion of counsel not subject to review.
140. Deed for property sold for taxes what to contain.
141. Mayor and counsel not to receive compensation.
- 142, 143. Council may authorize owner of property to grade street.
144. Property sold for delinquent taxes must be paid for and redeemed in coin.

145. Real property not laid off in lots to be assessed per
acre.

146. When purchaser of property sold for taxes to be
deemed an owner.

147. What acts repealed.

148. What ordinances continued in effect, rights vested
and liabilities incurred when this act takes effect.

149. Actions pending in recorder's court when this act
takes effect.

153 150. Codification and publication of city ordinances.

151. When this act shall take effect and reasons therefor.

SECTION 126. The city of Portland is not bound for any contract, or in any way liable thereon, unless the same is authorized by a city ordinance, and made in writing and by order of the council signed by the auditor or some other person on behalf of the city. But an ordinance may authorize an officer or agent of the city, naming him, to bind the city, without a contract in writing for the payment of any sum of money not exceeding one hundred dollars.

SEC. 127. The city of Portland is not liable to any one for any loss or injury to person or property, growing out of any casualty or accident happening to such person or property on account of the condition of any street or public ground therein. But this section does not exonerate any officer of the city of Portland, or other person from such liability, when such casualty or accident is caused by the wilful neglect of a duty enjoined upon such officer or person by law, or by the gross negligence or wilful misconduct of such officer or person in any other respect.

SEC. 128. No money shall be drawn from the treasury, but in pursuance of an appropriation for that purpose, made by ordinance, and an ordinance making an appropriation of money must not contain a provision upon any other subject, and if it does, such ordinance, as to such provision shall be void, and not otherwise.

SEC. 129. At the first election under this act, the councilmen from each ward, shall at the first meeting of the council thereafter,
154 in such manner as the council shall order, draw lots to determine the duration of the terms of such councilmen. The lots shall be for the term of one year, two years, and three years respectively, and the term of such members shall expire accordingly as they may draw either of such lots, so that thereafter, at every general election, except in the case of vacancies, there will be one councilman to elect from each ward for the term of three years. The proceedings connected with drawing such lots shall be substantially entered in the journal of the council.

SEC. 130. When an additional ward is created by the council, the three councilmen from such ward shall at the first election therefor, be elected for the terms of one, two and three years respectively; and the voting and returns thereof, shall take place and be made accordingly.

SEC. 131. The returns of the first election held under this act shall be made to the recorder then in office, in all respects as this act else-

where directs them to be made to the auditor, and such recorder shall canvass the same, and issue certificate of election in all respects as such auditor is elsewhere required to do by this act.

SEC. 132. A member of the council for words uttered in debate therein, shall not be questioned in any other place.

SEC. 133. The present mayor and council and all officers of the city of Portland, shall continue in office, until the first general election under this act, and until the tenth day thereafter, and from and after the time this act takes effect, and until such tenth day, shall perform the duties and exercise the powers and be subject to
155 the restrictions provided in this act for such mayor and council and like officers; and during such time the clerk of the council shall be known and act as auditor.

SEC. 134. The fiscal year of the city shall commence on the first day of January and end on the last day of December of each year, and during any such year, the rates of general and special taxes levied must not exceed in the aggregate one and a half per centum.

SEC. 135. The indebtedness of the city of Portland must never exceed in the aggregate the sum of fifty thousand dollars, and any debt or liability incurred in violation of this section, whether by borrowing money loaning the credit of the city, or otherwise, is null and void and of no effect.

SEC. 136. The city of Portland has power and authority to provide by ordinance for dredging the bars in the Willamette River, and for improving and keeping improved the navigation of the same, in front of and below the city of Portland, and in the exercise of such power and authority may provide and use all means necessary or convenient therefor, not prohibited by this act.

SEC. 137. For the purposes mentioned in section 136, there may be in each year of two successive fiscal years, levied and collected a special tax, not exceeding two per centum upon all property subject to assessment and taxation as provided in section 38; and for the same purpose there may be, in any other fiscal year, levied and collected a special tax, not exceeding one-half of one per centum, upon all property; Provided, that the special tax specified in section 38,
156 shall not be levied and collected in either of the two successive fiscal years in which a tax not exceeding two per centum may be levied and collected for the purpose specified in section 136 of this act, as authorized by the first clause of this section.

SEC. 138. The prohibition contained in section 134 does not apply to or include any special tax levied by the authority of and for the purpose mentioned in sections 136 and 137, and all provisions of this act in relation to the payment of taxes, the rate of interest thereon, and defining delinquent taxes, and providing for the collection thereof and redemption of property sold therefor, shall apply to and include any such special tax.

SEC. 139. In any action suit or proceeding in any court concerning any assessment of property or levy of taxes, authorized by this act, or the collection of any such tax or proceeding consequent thereon, such assessment, levy, consequent proceeding, and all proceedings connected therewith, shall be presumed to be regular and duly done

or taken, until the contrary is shown; and when any proceeding, matter or thing is by this act committed or left to the discretion or judgment of the council, such discretion or judgment when exercised or declared, is final, and cannot be reviewed or called in question elsewhere.

SEC. 140. In making a deed for real property sold for delinquent taxes, or a delinquent assessment for the improvement of a street, it is not necessary to recite or set forth the proceedings prior to the sale, but it is sufficient if it substantially appears from such deed, that the property was sold by virtue of a warrant from the city of Portland, and the date thereof, for a delinquent assessment or tax, and
 157 the amount thereof, together with the date of the sale and the amount bid thereat by the purchaser. The style of a warrant for the collection of delinquent assessments or taxes shall be: "In the name of the city of Portland."

SEC. 141. The mayor and councilmen are not entitled to, and must not receive any salary or compensation for their official services.

SEC. 142. Whenever the grade of any street has been established, the council may authorize the owner or owners of any property thereon, to cut down or fill up such street, in front of such property, according to such grade, at the expense and cost of such owner.

SEC. 143. The authority mentioned in section 142, cannot be given after an assessment has been made for the improvement of the street in front of such property, and in giving such authority, the council may impose such terms and conditions thereon, as may be necessary to secure the deposit of excavations upon any part of such street as may require to be filled up.

SEC. 144. Real property when sold for or to satisfy a delinquent assessment or tax, must be sold for United States gold or silver coin, and not otherwise; and any one applying or seeking to redeem property so sold, as in this act provided, must pay or offer to pay the sum necessary therefor, in such coin and not otherwise.

SEC. 145. All real property within the limits of the city of Portland, not laid off in blocks and lots, at the time of making any assessment authorized by this act, must be assessed at its cash value per acre or fraction thereof, as the case may be.

158 SEC. 146. Whenever any lot or part thereof is sold for a delinquent assessment for a street improvement, and afterward resold for a deficit in such assessment, as in this act provided, to any person other than the purchaser at the first sale, or his successor in interest, such purchaser or successor for the purpose of making redemption from the purchaser at such re-sale, is to be deemed an owner within the meaning of this act.

SEC. 147. The act entitled "An act to incorporate the city of Portland, passed January 23rd, A. D., 1851, is hereby repealed, and also all acts amendatory thereof, namely, "An act to amend an act entitled, 'An Act to incorporate the city of Portland,' " passed the House of Representatives, Jan. 13th, 1858, and passed the council January 15, 1858. "An act relating to the incorporation of the city of Portland," approved October the 17th, 1860. An act to amend an act entitled 'An act to incorporate the city of Portland,' " approved

October the 17th, 1862. "An act to amend an act entitled 'An Act to incorporate the city of Portland, and to amend an act amendatory of such act,'" passed January 15, 1858. Approved October 17, 1862.

SEC. 148. All city ordinances passed in pursuance of the acts mentioned in section 147, or either of them, in force when this act takes effect, and not inconsistent therewith, shall be and remain in full force after this act takes effect, and thereafter until repealed by the council; and all rights vested, or liabilities incurred under either of such acts, or any city ordinance, when this act takes effect, shall not thereby be lost, impaired or discharged.

SEC. 149. All actions and proceedings pending in the recorder's court for the city of Portland, when this act takes effect, shall thereafter be proceeded in according to the provisions of this act, or of any city ordinance applicable thereto, and continued in force by this act.

SEC. 150. The council at its earliest convenience after this act takes effect, must provide by ordinance for the codifying and publishing in book or pamphlet form of all city ordinances or parts thereof then in force, and for the publishing in like form annually thereafter, the city ordinances for the current year.

SEC. 151. Inasmuch as there is an urgent necessity that many of the streets within the city of Portland be improved before the commencement of winter, and a like necessity that the improvement of the navigation of the Willamette river be provided for at the earliest time possible, this act shall take effect and be in force from and after the tenth day after its approval by the Governor.

Approved Oct. 14th, 1864.

160 JOSEPH GASTON resumes the stand.

Cross-examination.

Questions by Mr. CAVANAUGH:

— Mr. Gaston, did you notice the photograph which was just exhibited here?

A. Yes, I looked at it a little.

Q. Does that represent approximately, the condition of Fourth Street at the time they built the road?

A. Well, you couldn't tell anything from that, as to the condition of the street.

Q. I mean as to the number of houses.

A. Yes, I think it does.

Q. The residences were sparse, especially southward?

A. Very scattering.

Q. Mr. Gaston, do you remember what, if any bonus, the residents of the city paid to the company for building the road?

Mr. FENTON: Objected to as immaterial.

COURT: Let him answer the question under your objection.

A. Well, the citizens, in the first place, had stock amounting to \$50,000. Then there was donations of land, the ten blocks of land

I spoke of before was only a part. Judge Marquam gave several tracts of land, and other old settlers who had lands, gave of theirs. Mr. Terwilliger gave a right of way estimated at over \$1700—gave it in timber. Then the City passed the ordinance agreeing to pay interest for so many years on \$250,000 of the company's bonds. And then afterwards when Holladay went to work, they made an outright donation of \$100,000. It was supplied by the taxpayers. It was agreed generally that they would pay a certain percentage of the assessment on their property—each man, and that would make \$100,000, and Mr. Jacob Stitzel circulated the subscription paper, and everybody subscribed on that basis. Captain Ainsworth, although interested in the company, subscribed as large as anybody else in proportion to his property. I suppose all together, I guess the city and the—that is the people—the city, gave \$10,000; gave one year's interest; that is, the city as a corporation gave, but the people, I think, gave first and last, about \$200,000.

Q. Could you say now, Mr. Gaston, or remember, what the construction of the road cost, from G Street to the southern limits of the city?

Mr. FENTON: I object to that. If he goes into the question of cost, to meet the question of donation, he should take the entire road that served the city. They did not give it for this mile of road, but they gave it to the road. I object for that reason.

Mr. CAVANAUGH: You brought up this question by asking how much they had given. I thought I would follow it up as to how much the city gave them.

(Question read.)

Objected to as immaterial. Objection overruled.

Exception saved.

Q. That is, from G Street, Mr. Gaston?

A. I could not tell exactly. I only recollect about one item. That was a contract with General Cochran as to building the bridges on the first five miles of the road, and that was a little over \$40,000 those bridges cost.

Q. Would it cost as much—do you think it cost as much as \$130,000, that part of the road—the original construction?

A. What part of the road?

Q. That is, from Sheridan Street where the limits were, there down to Glisan or G Street?

A. Did it cost that much? No, it did not cost that much.

Q. What were the size of the rails used that were first laid, Mr. Gaston, the weight—do you remember?

A. Well, I think that they were about 50 pound rails.

Q. Do you remember the size of the engines?

A. Well, in a general way.

Q. What type of engine were they?

A. Well, they was different. There were some second hand engines, one very large, considered a large engine at that time, a second hand engine brought from Pennsylvania, which run off the

track out there in the Beaver Dam swamp, this side of Beaverton, and laid there all winter. Never got it back. The others was smaller engines, and they were new engines.

Q. Do you remember the ton weight of the passenger engine?

A. No, I could not tell you that.

Q. The freights were larger than the passenger engine?

A. Yes.

Q. How many trains ran a day on this track when it was first built?

A. Well, there was just one train to Cornelius and back—that would be twice over—the same train would go out in the morning and come back in the evening.

Q. Were freight trains started as soon as the track was opened to traffic?

163 A. No, we hitched on the freight cars right on to the passenger coaches.

Q. A mixed train?

A. Yes, sir.

Q. How long did that continue?

A. That continued for the first year until the road was extended—I think was built by Gaston, beyond Forest Grove. Then they commenced getting wheat there and other produce, and they ran freight trains. It wasn't a large train.

Q. How long—

A. About twice a week only.

Q. How long after the track was completed, before they ran separate freight trains?

A. Well, that was—they run separate freight trains before the track was completed to the Yamhill River—to St. Joe.

Q. I mean after the track was completed in the city.

A. That must have been 18 months after that.

Q. How many cars—how many freight cars would they generally have in one of those freight trains—the first ones?

A. Oh, they—in running the mixed train, there would be a passenger coach, and a baggage car, and a couple of freight cars, sometimes more.

Q. And then when they started the trains made up wholly of freight cars—

A. Yes.

Q. —how many would they carry?

A. Well they hardly had more than six or seven cars for two or three years.

164 Q. Did they then have engines at both ends of the train to push it along as they do now, sometimes?

A. Oh, yes, they had to go up Fourth Street this grade, in fact, up to the top of the hill.

Q. What was the grade of Fourth Street when the track was laid?

A. Well, it was the same grade, I think, it is now.

Q. Never been changed?

A. Never been changed.

Q. Do you know the steepest grade on that street between Glisan and Sheridan?

A. I don't recollect.

Q. When did Mr. Holladay acquire some interest in this road?

A. In the summer of 1870.

Q. Prior to that time he had a company on the other side of the river by the same name, didn't he?

A. Yes, there was a company attempted to be organized at Salem under the same name and he went into that, and then he held on to that, and finally changed its name into the Oregon and California, and it was after he made that change that he bought an interest in the Oregon Central.

Q. Did the Oregon Central on the east side (I will designate it that way) have any interest in the lines on the west side at all?

A. No.

Q. But they claimed the rights up there on the east side?

A. Yes, well, they claimed a land grant in a way. That is, they claimed they was the Oregon Central. The question was, who was the Oregon Central for a good while, until Judge Deady got 165 to try the case, and he decided that the Salem people had no right to use that corporate name, and put them out of business.

Q. Well, it was the Oregon Central—the real Oregon Central—that made the application and got the privilege from the mayor here—

A. Yes.

Q. —to run their trains. How were the sizes of the engines that you used at that time, compared with the engines that are used on the same track now?

A. Well, I am not so familiar with the engines they use on the track now, only just see them passing along the street, but the engines now are generally double the weight they were then, and on the Portland route, going into Portland, they are more than double.

Q. How about the passenger coaches?

A. Well, they run very heavy passenger coaches on the main Portland line.

Q. Well, are the passenger coaches that run now on Fourth Street very much larger than the passenger coaches you ran?

A. Oh yes.

Q. Twice as large?

A. I expect they are.

Q. Practically the same true of the freight cars?

A. I think it is and the freight cars are a great deal heavier.

Redirect examination:

Q. The rails in the track are nearly twice as heavy as they were in '68, '69 and '70?

A. Oh, yes. The rails have been doubled in weight since.

Q. And the ties and ballast are much more secure than they were at that time?

166 A. Yes, the ties are larger and the ballast is all of broken stone and gravel.

Q. A 75 pound steel rail on this Fourth Street track would carry an engine twice as heavy—with the same, or no more friction—as the engine you use on a 50 pound rail?

Objected to.

A. More than that, because a 50 pound rail is an iron rail—the 50 pound rail we used in those days was an iron rail. Now they use steel rails.

Q. Now they use steel rails?

A. Yes, sir.

Q. What is the fact as to the resiliency or strength of the 75 pound steel rail as compared with the 50 pound iron rail?

A. I don't know. You would have to ask an engineer. I think in a general way, four or five times as good.

Q. Mr. Gaston, this Oregon Central that they have inquired about of you was in the act of building a road on May 4, 1870, when Congress passed this act designating the Oregon Central as the road now in process of construction, wasn't it?

A. Yes.

Q. And that is the Oregon Central about which you have been talking—is the Oregon Central designated in the Act of May 4, 1870?

A. Yes, sir.

Q. And received the land grant?

A. Yes, sir.

Witness excused.

167 L. R. FIELDS, a witness called on behalf of complainant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Fields, you are an officer of the Southern Pacific Company, are you?

A. Yes, sir.

Q. What position do you hold?

A. Superintendent of the lines in Oregon.

Q. How long have you been connected with the railroads known as the Oregon & California Railroad Company and the Southern Pacific Company, since it leased these properties?

A. 34 years.

Q. Now, in what capacity have you been connected with these roads, and for what period of time, as near as you can remember. What were your duties?

A. I have been superintendent for 20 years, train master for four years, train dispatcher for three years, and the balance of the time agent, telegraph operator and cashier at the Portland station.

Q. How old were you when you began the service?

- A. 18 years old.
- Q. Where did you begin?
- A. When did I begin service on this line?
- Q. Yes.
- A. I began the service as telegraph operator at Harrisburg, Oregon.
- Q. Have you been continuously in the service of the Oregon & California and the Southern Pacific up to the present time?
- A. Yes, sir.
- Q. In these various capacities?
- A. Yes, sir.
- Q. As superintendent of the Southern Pacific lines in Oregon, what is your duty?
- A. I have charge of the operating department.
- Q. Are you familiar with the operation of trains on the road leading from the Union Depot at the north end of Fourth Street—Fourth and Irving I believe it is—is it not?
- A. Yes, sir.
- Q. Through all the way to Forest Grove or Corvallis?
- A. Yes, sir.
- Q. Now, how long have you been familiar with the operation of that mileage, in any capacity?
- A. Well, since 18—about 18—about 1882.
- Q. And in your first acquaintance with it, what relation did you sustain?
- A. Train dispatcher.
- Q. Where was your office?
- A. Foot of Flanders Street.
- Q. In the company's building?
- A. In the company's building.
- Q. And how long were you train dispatcher?
- A. Well, I think about for our five years, I should think.
- Q. That was before the Southern Pacific Company obtained the lease?
- A. Yes, sir.
- Q. Now, as train dispatcher, what were your duties?
- A. I had charge of the movement of trains.
- 169 Q. Now, as superintendent what are your duties with reference to the operation of the road? What opportunities have you, if any, to observe the number of trains that move over it and all those matters?
- A. Well, as superintendent the reports come through my office. I have charge of the operating of the trains, and my subordinate officers report to me every day how the trains are, their movements, and the same in connection with the maintaining of the road.
- Q. And how as to accidents?
- A. All accidents are reported by wire immediately to me, following general accident report.
- Q. When you were train dispatcher did you have some oppor-

tunity to know the physical operation of the road—accidents and things of that kind?

A. As train dispatcher all accidents were reported to me as well as to the superintendent.

Q. Who was superintendent preceding you? Brandt?

A. Mr. Brandt—John Brandt.

Q. Now, Mr. Fields, from your knowledge of the operation of the railroad from the Union Depot along Fourth Street to the southern boundary limits of the city, as it has been since you knew it and up to the present time, and particularly on Fourth Street, I will ask you to state to the court, what accidents, if any, or injuries to persons or property either on the trains or on the street, or in connection with the operation of the trains have occurred during the period that you have — superintendent and train dispatcher of this property, a period of 26 years?

170 A. There have been two accidents resulting in death—one at Burnside Street and one between Stark and Morrison. The last one mentioned was something over 20 years ago. That was a man, an ex-railroad man attempting to board a freight train coming into the city.

Q. Going north?

A. Going north. He was under the influence of liquor and missed his footing and fell under. The other one was a man attempting to board an excursion train going out from Portland, going to Sheridan on a Sunday evening, attempting to board a train on Burnside Street and he was——

Q. Was the train in motion?

A. How is that?

Q. Was the train in motion?

A. The train was in motion, and he was making an effort——

Q. What was his condition?

A. He was also under the influence of liquor.

Q. Now, have there been any personal injuries that did not result in death?

A. Yes. There has been—there has been a few, wagons being struck by backing out onto the train, or going alongside on the street.

Q. I don't mean injury to property—I mean injury to persons.

A. I was going to say these parties driving the wagons being thrown out, but in every one of those cases it was by reason of their backing up, as I said before, against the train while the train was in motion, or driving alongside of the train, and getting too close to it and being struck by the steps.

171 Q. Were any of these accidents serious, or trivial?

A. None serious, that I can recall now.

Q. Do you recall the circumstances of a collision with one of the engines of the company with a street car about a year ago?

A. Yes, sir.

Q. Where was that?

A. That was at—well, the upper crossing of the Portland Railway Light and Power Company—I can't recall the street now.

Q. In the south end?

A. South end of the city. The motorman attempted to cross over ahead of the train, and got struck.

Q. And what happened?

A. Well, there was some injury to one or two passengers.

Q. Passengers in the——

A. In the car.

Q. In the street car?

A. In the street car.

Q. Was that investigated by the Railroad Commission?

A. That was investigated by the Railroad Commission, and they held that the motorman was careless in running his car. I was not here at the time, that that occurred, and am not very familiar with it.

Q. Which way was our train going?

A. I believe our train was coming in.

Q. Do you know whether passenger or freight?

A. I believe it was the hill engine—what we call the hill engine.

172 Q. Now, with that exception, has there ever been, during the time you have known this property, any collision with any street car or wagon crossing Fourth Street, with any train or engine of a Southern Pacific Company or the Oregon & California Railroad Company?

A. Well, since that time there was a wagon that attempted to cross over—cross the track just ahead of the yard engine and that was struck, and the driver thrown out.

Q. When was that?

A. That was about four months ago.

Q. Where?

A. That was up near College Street.

Q. In South Portland.

A. Yes, the man was riding this wagon in the same direction that the train was going, that the engine was going and attempted to cross over ahead of it.

Q. In the day light?

A. In the day light.

Q. He attempted to drive in front of the engine?

A. In front of the engine.

Q. Going in the same direction that the engine was going. Now, with the exception of those you have named, have there ever been any collisions of any street car or any wagon or any vehicle, or any automobile, or any buggy, during the 26 years that you have been operating this property?

A. No, sir, not to my knowledge.

173 Q. I will ask you to state, Mr. Fields, to the court, as an expert having knowledge and experience in the operation of these roads over Fourth Street during this period of time whether in your opinion, trains, both freight and passenger, could be operated with reasonable safety to the people having occasion to cross the streets, the people having occasion to ride in the cars across

these streets, and to footmen and others of the public, with the city having its present population, say 225,000, or even twice as large, or more, or any number of people.

Mr. KAVANAUGH: I object to that. This question is so entirely leading, that I think that form of examination ought to be changed. He has been entirely leading all the way, and it is immaterial.

Mr. FENTON: I think an expert question, your Honor, would have to be leading.

COURT: The witness may give his opinion. I don't know just what materiality it has to the case.

Q. You may answer it.

(Question read.)

A. Well, I hardly understand, Mr. Fenton, what you want.

Q. Well, I want to know whether the trains could be operated safely, in your judgment?

A. Could be operated safely?

Q. Yes.

A. Not more so than they are at the present time.

Q. What do you say as to whether they are operated safely now?

A. I do. I think they are.

Q. Then in your opinion, the trains could be operated with reasonable safety, notwithstanding the increase in population—is that it?

A. Yes.

Q. Is that the idea?

A. Yes, sir.

Q. Have there ever been any gates or signals placed at
174 the intersection of any of those streets?

A. No, sir.

Q. Has there ever been any action taken by the city to require a watchman or safety gates at any of those street crossings on Fourth Street?

A. No, sir. There was some agitation in the council a number of years ago, with reference to installing gates at Washington and Morrison and Alder Streets, but it never went through the Council.

Q. Has there ever been any requirements on the part of the city to install electric bells at any of these crossings, to give warning of the approach of a train?

A. No, sir.

Q. State to the Court, whether or not those bells are installed, or those gates are put in on East First Street or other places in the city?

A. Yes, sir; there are several places on the east side of the river, east First and Morrison Street and East Fifth Street, Grand Avenue, Milwaukee Street, Powell Street.

Q. Where are there any gates?

A. Gates at East Morrison and East First, and First and Madison—East First and Madison.

Q. Now, about how many trains of all kinds are operated and have been operated over Fourth Street into the depot, Union Depot,

in the past two years, and how many are operated at the present time, and the character of the trains?

A. That is trains and light engines?

Q. Yes.

A. What I call light engines is engines without cars.

Q. Yes. Well, separate the light engines and give us the
175 trains?

A. Well, there is—in the last two years it will average from eight to ten passenger trains, two freight trains, two regular freight trains and one extra freight, and six—six to eight—light engines.

Q. You mean daily?

A. Daily.

Q. Each way?

A. That is the total.

Q. That is the round trip.

A. That is the round trip.

Q. Has that been about the number of trains and the volume of business for the past two years?

A. The past two years, yes, sir.

Q. Now, what—where does all of that freight and passenger traffic originating at Corvallis and at intermediate points to Portland, in what way does it get into Portland?

A. It gets in over Fourth Street.

Q. Is there any other way for it to come into the City of Portland at the present time?

A. Well, not direct. Freight is taken—considerable freight has been taken around by the way of the Corvallis & Eastern to Albany, to the main line. That is loaded on the south end of the line.

Q. I mean the business from Corvallis north on this line. Which way would it have to come?

A. Down Fourth Street.

Q. Where are the docks and warehouses with reference to the Union Depot?

176 A. They are north of the Union Depot.

Q. Where is the Union Depot with reference to this railroad on Fourth Street?

A. Just at the foot of Fourth Street.

Q. And what is the fact as to—what business—what trains put into the Union Depot and have their terminus there?

A. All trains of the Southern Pacific, as well as—

Q. And what other?

A. The Northern Pacific, the Astoria & Columbia River, and the Oregon Railway & Navigation.

Q. Where is the—what is called the North Bank or the Portland, Seattle & Spokane Railway?

A. They come into their own yards north of the terminal yards.

Q. Is there any other way to get the business to them, excepting through the North Pacific Terminal Company's yards?

A. No, sir.

Q. How would any business that would be interstate, that is, going out of the state, and to roads connecting at Portland, leave from Corvallis and points north? How would it have to come?

A. Will have to be brought into Portland.

Q. Over Fourth Street?

A. Over Fourth Street.

Q. Can you say, Mr. Fields, in a general way, what percentage of the business of the west side division on the line from Corvallis to Portland is passenger, and what percentage is freight business?

A. Well, 75 per cent—I should say 75 per cent is passenger—25 per cent freight.

177 Q. In earnings you mean?

A. Yes.

Q. What is the grade, do you know, of the line on Fourth Street, about what grade?

A. Maximum grade?

Q. Yes.

A. 197 feet to the mile.

Q. That would be—

A. About 3.4 per cent.

Q. How much?

A. About 3.4 per cent.

Q. The steepest part of the grade?

A. Just above the City Hall.

Q. What effect has the grade upon the amount of noise made by trains?

A. It naturally makes more noise in overcoming that grade than it would on level track.

Q. Do you know what rail is now on the track?

A. From Burnside Street to Jefferson Street is a 90 pound rail.

Q. Steel?

A. 90 pound steel rail, yes, sir. From Jefferson Street to—from Jefferson Street to Beaverton is 62 pound steel.

Q. And from Burnside Street north into the terminus, what is it?

A. 62 pounds just at present.

Q. All steel?

A. Yes, sir, all steel.

Q. What size engine do you operate?

A. The heaviest engine we operate on Fourth Street now weighs 106,000 pounds—the total weight of the engine. That is, not including the tender.

178 Q. How does this compare with the engines that were operated a few years ago, before the rail was made heavier when they had a 56 pound rail?

A. Well, the heaviest engine we operated then weighed 85,000 pounds.

Q. Did you or not operate that 85,000 pound engine on a 56 pound rail?

A. Yes, sir.

Q. When was the 56 pound rail removed, and the heavier rail you mentioned put in?

A. I could not say as to that. That is only here on Fourth Street from Burnside to Jefferson.

Q. Yes, will you state?

A. That has been about, say, 10 years.

Q. And from Jefferson Street south, when were the heavier rails put in—how long ago, approximately?

A. Oh, that is 20 years.

Q. When was the 75 pound rail put in?

A. The 75 pound rail has been put in the last two years—that is from Beaverton south to McCoy.

Q. Now, were these heavy rails—I will ask you to state whether or not the train is operated with the same safety and efficiency as the lighter engine and train was operated on the 56 pound rail.

A. Yes, sir.

Q. When did the Southern Pacific first take possession of this property and begin to operate under its lease, do you remember?

A. I think about 18—about 1884.

Q. 1887, wasn't it, July 1st?

A. Yes, that is right, about 1887.

179 Q. And has operated it ever since?

A. Yes, sir.

Cross-examination.

Questions by Mr. KAVANAUGH:

—You say there were only two people killed, Mr. Fields, on that line, since you were superintendent and connected with the service?

A. Yes, sir.

Q. Sure you haven't forgotten any one?

A. That is all that I recall to mind.

Q. Do you remember a little girl being killed on the Fourth Street Bridge out there?

A. Well, that was off the street, that wasn't on Fourth Street. That was out on the other side of what we call the trestle spanning Marquam's gulch, second trestle.

Q. City limits wasn't it?

A. City limits, but it wasn't on Fourth Street.

Mr. FENTON: That is on private right of way.

Mr. KAVANAUGH: It would make no difference, as I see.

Mr. FENTON: The witness said on Fourth Street.

Q. You say you have no gates along this road?

A. No gates—no gates on the West Side division.

Q. When did you put the gates on the East Side division?

A. About three years ago.

Q. How did you come to put them there?

A. Well owing to the immense amount of travel across those streets, and at the request of the city.

Q. You have travelled a good deal in other cities, and noticed railroad equipment, have you not?

A. Yes, sir.

Q. Noticed a good many gates in other cities where trains
180 come through, haven't you? Safety appliances?

A. Yes, I have, but of all those cities where I have noticed that they have gates, they have a very fast speed for their trains. They don't hold them down to six miles per hour. They run at a very fast speed.

Q. Coming down the 3.4 grade with a heavy loaded freight car at six miles per hour, how long would it take an engineer—within how short a distance, could an engineer stop?

A. At six miles an hour, he ought to stop in 50 feet.

Q. With a heavily loaded freight train?

A. With a heavy loaded freight train, brakes with air on every car working.

Q. The grade would make some difference, wouldn't it?

A. The grade would make some difference, naturally, but six miles an hour is a very slow speed.

Q. Doesn't the moving of the train up that grade cause a very loud noise?

A. Yes, yes, a loud noise.

Q. Doesn't it cause a good deal of discomfort to people along that street?

A. Well, I don't know. I don't know as to that. One gets used to it, I should think, like the street cars.

Q. When does your first train go out in the morning?

A. The first train is what we call the hill engine taking up freight, about six o'clock.

Q. What is the next train in the morning?

A. The next train is the passenger train leaving at 7:20.

Q. What is the last train at night, running either way?

A. The last train at night is the train leaving at 6 o'clock, about—
181 arriving in here at 6:30. No, it is changed now. We changed the time. The train

Q. Don't you run a good many night trains there?

A. No, we run no night train unless the freight train is late.

Q. Well, isn't it—doesn't it frequently come in at night?

A. Yes, frequently comes in at night.

Q. Have you ever been in one of the court rooms on the east side of the court house when the freight train was passing?

A. No, I never have.

Q. Have you even been in the council chamber when it was passing?

A. No, sir.

Q. Have you ever been in the business houses immediately adjoining Fourth Street when the train was passing?

A. Yes, sir.

Q. It stopped all conversation does it not, on account of the noise?

A. Why, I don't know as to that.

Q. A store situated like Mr. Selling's—Ben Selling's on the corner of Fourth and Morrison?

A. I have been in Mr. Selling's place a number of times when the trains were passing, and it never stopped my conversation.

Q. You don't know whether it stops proceedings in the court or not?

A. No, I couldn't say as to that.

Q. You say it hasn't stopped your conversation with Selling?

A. No, sir.

Q. You kept along just as if the trains were not passing?

A. Yes.

182 Q. Now, I didn't quite understand you when you gave the number of trains—average number of trains—eight to ten passenger,—that is both ways?

A. That is both ways.

Q. Would not be twice that number?

A. No, that is the total number—four out and four in, or five out and five in.

Q. Two freights?

A. One out and one in.

Q. And how often have you more than that?

A. I think—

Q. One extra freight?

A. One extra freight, I have allowed for. We don't average that.

Q. Six to eight light engines—that would make the summary. That would make eight passenger, two freight, one extra, six light engines—seventeen a day.

A. That is about right.

Q. Pretty generally distributed along at different hours—meant to be?

A. Well, from six o'clock in the morning to 6:30 in the evening.

Q. The passenger traffic is much heavier than the freight on that street—on that line?

A. Yes, sir.

Q. How do you account for that, Mr. Fields?

A. Well we run more passenger trains. We have the suburban train out as far as Forest Grove, that runs three round trips each day.

Q. It is not true to the same extent on the other side of the river, is it?

A. Oh, yes, yes more passenger traffic on the other side of the river than freight—more passenger trains than freight.

183 Q. More passenger trains, I will admit, but it does not bring more revenue to the company, does it?

A. No, I think there is more revenue in the freight business on the other side of the river than there is passenger revenue, because it is a good long haul.

Q. There is only one way that you can come from Corvallis to Portland by your own lines, and that is along Fourth Street?

A. Yes, sir.

Q. The only way to get on the Corvallis & Eastern—is that your road too?

A. I believe they have acquired a controlling interest in it recently.

Q. So that you could pass freight and passengers that way to Albany and in on the other side?

A. They could be sent that way.

Q. Are you making any arrangements to divert this traffic across the river at some point south of Portland?

A. Yes, sir, we are building a line from Beaverton to Oswego, crossing the river at Oswego, connecting the line with our main line at Willsburg.

Q. Is it your intention after that bridge and road is constructed, to divert the freight traffic on that line?

A. Well, I have not been made acquainted with what the company is intending to do.

Q. You don't know why it was built at all?

A. I suppose it was built to eliminate this here heavy grade, and avoid putting this freight into the terminal—through the terminal—making a direct connection with the O. R. & N. at East Portland—at Albina.

Q. There would be some advantages to you especially in 184 interstate shipment to have that cross?

A. There might be some advantage in the way of expediting the movement.

Q. Do you know what type of engines were operated on this road when it was first constructed? You didn't have any knowledge of the road when it was first constructed?

A. Yes, I did. Because those engines were here when I went to work for the road in 1875.

Q. What type of engines were they?

A. They were eight wheel—what we call an eight wheel engine, and their weight was about 48,000 pounds.

Q. Passenger and freight about the same weight?

A. Passenger and freight about the same weight.

Q. Now, I understood you to say that the railroad traffic in your judgment would be perfectly safe along Fourth Street for a city twice the size of Portland?

A. Yes, sir.

Q. That would be, say 500,000 people?

A. Yes, sir.

Q. It would be also safe if there were a million, I suppose?

A. I think so, at the speed we operate over that street.

Q. What object do larger cities have in excluding steam locomotive railroads from grade travel?

Mr. FENTON: I object as incompetent, and the witness could not know.

Q. If you know.

A. Well, I don't know positive. I suppose——

185 Q. You know there is a very great tendency in cities throughout the country to prevent locomotives at grade crossings, don't you?

A. Yes.

Q. Make them go into elevated roadways?

A. Yes.

Q. You have no means of knowing why that is done?

A. Well, I suppose the speed has something to do with it. I don't know—possibly.

Q. Isn't it a fact that the steam locomotives have something to do—noise, cinders, and dust, and ringing the bells?

A. Well, possibly, but cinders—there isn't much dust, very little dust—no cinders at the present time.

Q. Isn't it often a great inconvenience to have to wait at a street until a long freight train slowly passes by?

A. Yes that is true.

Q. Don't the passage of your freight trains often congest and stop street car traffic?

A. Yes.

Q. How many street car lines cross your track within the city limits?

A. Mr. FENTON: You mean Fourth Street.

Q. Fourth Street, yes.

A. Six, I can count.

Q. Six. Where does the furthest north cross?

A. At Glisan Street?

Q. Double track?

A. Yes, sir.

Q. The next is where?

A. Burnside.

Q. Burnside—another double track there, is there?

A. Double track.

186 Q. Next Stark?

A. Stark.

Q. Double track at Fourth Street?

A. No, that is the United Railroads—they only have a single track as yet.

Q. Double track just above, and single track just below?

A. Sir.

Q. Double track just above, and single track just below?

A. I think the track is laid double, but only running——

Mr. FENTON: Single.

Q. It is double from Fourth Street up?

A. I don't believe they have but one crossing. I think probably it is only single between Third and Fourth. They have a franchise for double.

Q. And double track on Washington Street?

A. Yes, sir.

Q. On Morrison Street.

A. Morrison Street.

Q. And where is the next crossing—up in South Portland—Fifth Street?

A. One up in South Portland, but they have discontinued running that.

Q. You mentioned something about the Railroad Commission finding that the street car motorman was responsible for a certain collision that occurred there?

A. Yes, sir.

Q. Did you see the report of the Commission?

A. No, sir, I did not see the report.

Q. You don't know whether they made any recommendation to the city to secure the removal of your engines from Fourth Street, did they?

187 A. I don't think they did—I never heard of it.

Q. All through freight and passengers going to points south—in California—are all taken on the east side road—aren't they?

A. Well, no, some of those passengers—you mean brought in here and then taken out on the east side?

Q. People that come, say from the east or from the north here, they follow your line direct on the east-side road, do they not—all through passengers to California?

A. To California—oh, yes.

Q. And all through freight?

A. Yes.

Q. You don't switch it to this line at all. This is purely local?

A. This is purely local.

Redirect examination:

Q. Mr. Fields, counsel asked you about your crossing the Fourth Street line by the United Railways. That is the line projected to Tillamook?

A. Yes, sir.

Q. What would be called an interurban and country road?

A. Yes sir.

Q. Operated by electricity?

A. Yes, sir.

Q. What is the distance—does that bring freight into the city?

A. They handle a little freight now, I believe, wood.

Q. How long has it been in operation?

A. About a year and a half.

Q. And how far is it constructed?

A. About nine miles.

Q. Out to—

A. Burlington.

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Q. And that also has a track down Front Street, has it?

A. Yes, sir, a track on Front and a track on Flanders.

Q. Now, the other tracks are the Portland Railway Light & Power Company?

A. Yes, sir.

Q. That is a city and suburban line?

A. That is a city and suburban line.

Q. Now, what is the length of line from the depot grounds here in the city of Corvallis?

A. 96 miles.

Q. What is the length of line from the depot to Sheridan street, where Fourth Street originally ended?

A. Well, I should say about a mile—about twenty—probably more—twenty-two blocks.

Q. What is the distance from that point to the city limits up on our right of way?

A. About two miles, I think.

Q. What is the speed limit enforced by the city of Portland here?

A. Six miles per hour.

Q. Now, what lines feed into this line from Corvallis to Portland, branch lines or connecting lines, that handle freight and passenger traffic?

A. Independence & Monmouth, at Independence, our Yamhill division at Whitson and also at St. Joe.

Q. None from the east going west?

A. None from the east—and the Corvallis & Eastern at Corvallis, and the Alsea Bay Line—Corvallis and Alsea Bay Line at Corvallis.

Q. How about the line to Hillsboro, projected to Tillamook?

A. The Pacific Railway & Navigation Company.

Q. Is that line in process of construction?

A. Yes, sir.

Q. How far from Hillsboro west?

A. 40 miles west of Hillsboro—this side, and the other side from Tillamook working east.

Q. Is there any other way for that traffic on that line to come into Portland on that line except over Fourth Street?

A. Yes, sir, the passenger travel can come in over the Oregon Electric line from Hillsboro.

Q. I mean over the roads of the company?

A. Not over the roads of the company, no.

Q. Is there any way for freight business originating on that Pacific Railway & Navigation Company, being the Tillamook line, getting into Portland, except over the Fourth Street line?

A. No, sir.

Q. How does the passenger traffic going to California and points south, that originates, we will say, from Independence north, get on the line to San Francisco—by what road does it travel?

A. They come into Portland, and take the main line out of here.

Q. Is that the ordinary or usual way?

A. Yes, sir, usual way.

Recross-examination:

Q. When you say, Mr. Fields, that there is no other way to get into Portland except along Fourth Street, you mean no other way until another arrangement is made?

A. Yes, that is what I mean, until some other arrangement is made, there is no other way of getting into Portland.

190 Q. There will be another way to get in when the bridge is constructed at Oswego, will there not?

A. Yes, they could come in that way.

Q. There would be another way if you come into the city on some other road too?

A. I don't know of any other road you could get in.

Q. Aren't the electric lines finding routes out right along?

A. Well, the electric line is not getting into the city proper, not into the terminal.

Q. You spoke too of an electric line being projected to Tillamook—their franchise does not call for any such a run as that, does it? Hillsboro, isn't it?

A. Forest Grove, I believe, is their franchise.

Q. It is Hillsboro. They don't operate by steam, do they?

A. No. They are not handling—they are doing some construction work with steam locomotives.

Q. They don't handle any freight at all on Stark Street do they—according to their franchise they can't.

A. I don't think so. They are holding on Flanders Street. They are hauling on Front.

Redirect examination:

Q. They do bring in freight cars on Stark Street, don't they?

A. Well, I could not say, Mr. Fenton. I have not seen them bring any in on there.

Witness excused.

191 J. P. O'BRIEN, a witness called for the complainant, being first duly sworn testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. O'Brien, your name you have given. Your residence, age and occupation?

A. J. P. O'Brien, General Manager of the Southern Pacific lines in Oregon, age 47, residence Portland.

Q. How long have you been connected with the operation of the line known as the West side division of the Oregon and California Railroad Company, or the Southern Pacific lines in Oregon between Portland and Corvallis, over Fourth street?

A. About five and a half years.

Q. In what capacities?

A. General superintendent and general manager.

Q. How long have you been in railroad service, and in what capacities?

A. About 22 years—26 years—started in as trucker in the freight house, all the branches of the operating service from that up.

Q. Can you name those—roughly speaking?

A. Telegraph operator, station agent, conductor, train dispatcher, train master, purchasing agent, assistant superintendent, superintendent, general superintendent, general manager.

Q. And how long have you been general manager of these properties, and what properties are in your jurisdiction?

A. About six years I have been general manager of the
192 Southern Pacific lines in Oregon, about three years—about two years, two and a half years had charge of the Ilwaco road and the Corvallis & Eastern.

Q. What mileage and total does that cover, approximately?

A. Practically about 2,000 miles.

Q. And what states and territories?

A. Oregon, Washington and Idaho.

Q. Now, as general manager of the Southern Pacific lines in Oregon, what can you say as to any accidents that have occurred by reason of the operation of trains on Fourth Street during the times that you have been connected with these?

A. I can only recollect one personal injury case—the case of an injury to a man by the name of Hooker, who, I think, had a leg broken by being struck by a train that he walked in front of on Fourth Street.

Q. When was that, and where was it, if you remember?

A. I don't know as I can give you the exact date.

Q. How long ago was that?

A. About a year and a half ago, I should say it happened.

Q. What information have you had—what investigation have you made, and what knowledge have you of accidents to property during the time that you have known this Fourth Street line and operated it?

A. We have had quite a number of small accidents caused by teams backing into our train, vehicles being damaged slightly, caused by train starting up while they were doing their baggage work, or express work; have been no serious cases that I bring to mind.

Q. Where was this man's leg—where was the man whose leg was broken? Do you remember that name, or on what street it was?

193 A. No, I do not. My recollection is the name was Hooker.

Q. Where was it—Fourth and Hooker Streets?

A. I would not say.

Q. Fourth and Hooker Streets, South Portland?

A. I would not say definitely about that.

Q. I will ask you to state whether or not in your opinion as an operating official familiar with the operation and movement of trains on Fourth Street, those trains can be operated with reasonable safety to the public, and the passengers and employes as they are operated

at the present time, and as they are liable to be operated, if permitted to continue?

A. I know of no reason why they cannot be.

Q. Who is the claim agent of the Southern Pacific Company's lines in Oregon?

A. Mr. Hall.

Q. Did you ask him for a report of the accidents occurring on Fourth Street as shown by the records of the company, since November 1, 1905, when Mr. Hall took charge of the Southern Pacific lines in Oregon?

A. Yes, sir.

Mr. FENTON: If you insist upon calling Mr. Hall, I will have to do it. Here is Mr. Hall's report if you will permit Mr. O'Brien to refresh his memory by referring to it.

Mr. KAVANAUGH: He may refresh his memory.

Q. Please examine that report given you by Major Hall, and refresh your memory from it. State to the court what accidents have happened during the time, and what they were.

A. On January 30, 1906, a wagon was struck on Yamhill 194 and Fourth Street by train 4, Engine 1360, doing no damage of any consequence, and through the negligence of the driver. No claim was ever presented.

July 4, 1906, a team belonging to M. Wiser in charge of and being driven by Charles Shane, was damaged by being struck by the rear end of one of our baggage cars—the Corvallis passenger—the driver having backed up to the baggage car, trying to unload some ice-cream just as the train was starting. In this case we did not consider ourselves liable but on account of the damage to the wagon, team, etc., we paid \$25. in settlement.

December 19, 1906, James Hawley presented a claim for three days' horse hire on account of a horse alleged to have been crippled. Investigation showed the engine stopped on Fourth Street to have a helper engine attached to the rear end of train. This horse was standing on the left side of the track when the signal was given to start. The driver attempted to cross the track, but when he heard the bell he pulled so hard on the left rein that the horse fell and cut himself. While we considered no liability in this case, we paid the owner \$7.50.

On April 11, 1907, a wagon belonging to the C. J. Cooke Company contractors, backed into No. 9, as it was coming down the hill, striking the pilot of the engine, breaking both wheels of the wagon. No claim presented in this case, and no liability on the part of the company.

On September 5, 1907, Robert Bruner was injured and had a wagon damaged by Train No. 1, at Fourth and Flanders. This man was driving west on Flanders, and the engine struck the rear wheel of the wagon. In this case, while the accident seemed to have occurred from negligence of the driver, at the same time we 195 paid him \$50. for settlement for injury and damage to his team and wagon.

January 9, 1908, while engine 2193 was at the top of the hill on Fourth Street, a horse ran into the engine,—no driver on the wagon. The horse having been held by a weight at the end of a strap, very little damage to the wagon or horse. No claim presented and no liability.

February 3, 1908, Train 3, engine 1385 struck a team of horses belonging to the Peoples Furniture Company, standing in front of the Chamber of Commerce. The team became frightened, turned around and ran into the bumper beam, breaking the wheel. Company not liable, but at the same time the damages were only \$15.50 and we paid the bill.

February 28, 1908, Train Extra 2189 struck a buggy at Fourth between Oak and Stark, on account of the horse becoming scared at the train and backing buggy into the pilot of the engine. Damage claim \$7. which was paid, regardless of the fact that we did not see that we were liable.

May 20, 1908. One of Pick's storage wagons standing in front of the Belvidere Hotel backed up into awning of the hotel on account of the train passing. Men were loading furniture into the van, and claim that train was flagged, but the engineer didn't stop. The engine passed the van all right but struck the hood of the van, breaking the hood. No claim presented. Claim presented by the Hotel Company on account of damage to the awning, and we paid \$15. in settlement.

September 24, 1906,—this is the case I had reference to—I didn't get the name right. W. H. Smith, Fourth and Hooker Streets, was struck by No. 4, as he was attempting to cross the track ahead of the train, was knocked down and leg broken, as well as sustaining some other slight injury. No liability whatever on the part of the company and no claim ever presented.

Q. Where is Fourth and Hooker?

A. Several blocks above where we are at the present time.

Q. That is above Sheridan?

A. Above Sheridan.

Q. Beyond Fourth?

A. Yes, beyond Fourth.

Q. Now, Fourth and Hooker—when you say Fourth, it is entirely on private right of way, as acquired by the company?

A. Yes, when we leave Fourth Street we have.

Q. As I understand, when we leave Fourth Street at Fourth and Sheridan, we are operating on our own right of way, and the city has laid streets across it afterwards?

A. I would not say exactly where the line is, but I know that condition exists—after we get up a few blocks, we are on private right of way.

Q. Now, Mr. O'Brien, I will ask you to state to the court what is the present situation with reference to the construction of the Beaverton and Willsburg Railroad Company—where that road is proposed to be built and its purpose and progress and estimated cost and why.

Mr. KAVANAUGH: What possible effect can that have on whether this is a dangerous road in the City of Portland.

COURT: I don't know as it has any, but you were asking Mr. Fields, and they didn't say anything about it. Mr. Fenton has brought out everything about it on the examination. He made some statement on it in his first opening statement, but did not ask Mr. Fields. Let Mr. O'Brien testify on the subject.

A. We are building a cut-off—what is termed a cut-off from Beaverton to Oswego, crossing the Willamette River at that point, and connecting up with our East Side at Willsburg. This line is, I should say off-hand, that this line is eighty per cent completed, and if it had not been for the excessive weather we have had, and the liability of losing our structure over the Willamette River, we figured we would have been in position to operate this line not later than January 15th or the first of February at the outside.

Q. 1910?

A. 1910. Within the last four or five days we have lost the false work for one span of the bridge—Howe Truss Bridge—and it is necessary to put in false work to carry the steel structure until we can get it up and secure it properly so it will hold itself. This false work we lost, I think, day before yesterday,—no, I think it was Friday—last Friday. We estimate the cost of the false work at \$8,000, or \$9,000. In view of the threatened—of the weather conditions, and the liability of sudden rise in the river which brings with it a great deal of drift, and would possibly take out the false work again if replaced, and the liability of losing the structure in case of a rise while the bridge is on this false work and not securely fastened, we have decided we are taking a very great chance in attempting to put the bridge up before the early spring when the weather conditions settle, and in all probability this line will not be completed before April 1, possibly a little later. The cost of this matter, including the change in the line of the Yamhill division of the line—the Jefferson Street line—which it is necessary to do in connection with the two branches of this cut-off in order to get a proper grade line to connect up with, will be between \$1100,000 and \$1,200,000.

Q. What is the length of that mileage?

A. I should say something like 20 or 22 miles. I also think there has been about—my recollection is there has been about \$850,000 expended on the work up to date.

Q. Now, you say 22 miles and a fraction. You mean from the—you mean from Beaverton around into the depot?

A. No, I mean Beaverton—I could not give you the exact mileage, but I would say about from 18 to 20 miles from Beaverton to the point where we connect up with the East Side main line at Willsburg.

Q. Now, what is the object of spending this large sum of money to take care of that West Side business?

A. To take off of Fourth Street our freight traffic, and some of our passenger traffic, also to keep a good deal of this through business out of our terminals on the West Side, which are already very badly crowded.

Q. I will ask you to state what the fact is as to the expensiveness and difficulty of operating up the Fourth Street line on the present grades, and whether or not for economic reasons the company is or is not constructing this cut-off on that account in part?

199 A. To a certain extent, yes. Our operation of the Fourth Street line is very expensive on account of the additional power necessary to move our traffic over this heavy grade getting out of town, and off hand, I should say that the cost of operation for this section of the line, over the heavy grade, of the line, is five to one as compared to other lines, on account of the difference in grade conditions.

Q. Have you made any efforts to install on the Fourth Street line any other kind of motive power for the movement of passenger traffic, and if so, with what result?

A. We have experimented—

Mr. KAVANAUGH: Immaterial, if the Court please.

COURT: He may answer. You were trying to prevent the use of locomotives, I suppose?

Mr. KAVANAUGH: Sure.

COURT: The question would immediately arise as to whether that would be a virtual repeal of the franchise, if they cannot use any other power.

Mr. KAVANAUGH: It makes no difference if it does, if it is necessary to be done.

COURT: That is a question as to how far the city can go.

Mr. KAVANAUGH: Save an exception.

A. We have experimented several times with gasoline motor cars, but until some new cars that have just arrived, we have been unsuccessful in handling the business on account of not having sufficient power to move the cars on the very heavy grades. We have, however, two new cars that have arrived recently—200 horse power, which will, in my opinion, serve the business, if it becomes necessary to put them on—if we decide to put them on.

Q. That is as to passenger traffic?

A. Yes, for passenger traffic.

Q. What is to become of your freight traffic?

A. I don't know.

Q. Could you operate the freight business at all except by steam locomotives on the Fourth Street line?

A. I presume that if we got heavy enough electric power motors we might be able to get our freight traffic over the street.

Q. Is that practical then, in the present situation?

A. I don't think it is. I have not had much experience in that line of work, as far as electric power is concerned—moving traffic in that way.

Q. Now, what, if anything, has the city ever requested or asked to be done with reference to the installation of watchmen or of gates, or of electric bells, or of any other safety appliances as to regulation on Fourth Street?

A. I know of none. No requests of that character.

Q. I will ask you to state to the Court whether or not that is, in your experience and observation, a practical regulation for the safe—reasonably safe operation of railroads at grade crossing streets that are used continuously and considerably?

A. I think it is. It is a common practice all over the country.

201 Q. What rate of speed is permitted for the movement of trains within the city limits—do you know?

A. No, I would not say—I think it is six miles an hour, but our time card will show. I will not testify.

Q. Do you recall, Mr. O'Brien, the sending, or signing, of a protest of date May 1, 1907, copy of which I show you, and the original of which should have been mailed to the Mayor and Common Council of the City or City Auditor?

A. Yes, sir.

Q. I will ask you to state to the Court whether that is a correct copy of the original that you signed, on behalf of these two companies, and at my instance, and for the purpose of mailing to the officials of the city, the number of the ordinance being inserted—or proposed ordinance?

A. I think it is, yes, sir.

Mr. FENTON: Have you any objection?

Mr. KAVANAUGH: No, not if it really went in.

Mr. FENTON: I cannot find the original, and the City Auditor has not been able to find it, and I offer that:

To the Honorable Mayor and Common Council of the City of Portland:

The Oregon & California Railroad Company and the Southern Pacific Company, lessees, as the successors in interest in possession of all the rights, franchises and privileges created and conferred by Ordinance No. 599, passed and approved January 6, 1869, granting
202 to the Oregon Central Railroad Company certain rights on Fourth Street in the City of Portland, to which rights reference is hereby made, do hereby respectfully protest against the passage of Ordinance No. —" (The number is not here) "upon the following ground, to-wit: That the said proposed ordinance is unreasonable and invalid, but particularly because it is not within the power of the Common Council to repeal, amend or modify said Ordinance No. 599.

OREGON & CALIFORNIA RAILROAD
COMPANY,

By J. P. O'BRIEN, *Its Second Vice-President.*

SOUTHERN PACIFIC COMPANY,

By J. P. O'BRIEN, *General Manager.*

Dated May 1, 1907."

— You were Second Vice-President of the Oregon & California Railroad Company at that time?

A. Yes.

Q. And were the executive officer of that company resident at Portland?

A. Yes, sir.

Q. And you were also the general manager of the Southern Pacific lines in Oregon at that time?

A. Yes, sir.

Q. And are now. And that was prepared under the advice of counsel, and sent before this ordinance was passed?

A. Yes, sir.

Q. Are you the same J. P. O'Brien *was* was arrested under that ordinance in this complaint?

A. I am.

203 Q. You had seen the ordinance referred to in that blank notice—a copy of it—as proposed to be passed, at the time that was written?

A. Yes, sir.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Mr. O'Brien, the report you read was the data of Major Hill, and his report?

A. Yes, sir.

Q. He is the elderly gentleman in the Claim Department?

A. He is the head of the Claim Department.

Q. Rather an elderly gentleman?

A. Yes, sir.

Q. Did you ever know him to admit to a payment that the company was liable for?

A. I have.

Q. Very rarely.

A. I have, I say.

Q. How often have you?

A. Well, I could not say as to that.

Q. I think you mentioned in your direct examination that it was the practice in cities to have watchmen and electric bells and gates to protect it against trains going through.

A. Yes, sir.

Mr. FENTON: What was the question?
(Question read.)

Q. Is it not a general practice over the country, Mr. O'Brien, in cities of the size of Portland, to require the removing of engines from grade crossings all together?

204 A. I don't think so. Not in large cities where I have experienced matters of this kind and had charge of properties.

Q. Ran right straight through the residence and business section?

A. Well, I—

Q. On narrow streets like the streets of Portland?

A. I would not say through residence or through the business—

Q. On grade level?

A. Yes, sir.

Q. Do you know whether or not anything was done like that in the city of Richmond, Virginia?

A. No, sir, I don't.

Q. Are you acquainted with the size of that city?

A. No.

Q. St. Louis, Missouri—do you know of any action of that kind?

A. No. I can give you some cases, though—some cities—if you would like,—can name them.

Q. Do you think that a steam road running down and back Fourth Street would cause less danger, inconvenience and annoyance to the public than an electric road would, on the same street?

A. I think an electric line would probably be a little less inconvenient, but as far as safety is concerned, I don't think there would be a particle of difference. I think our record for the last five years, since I have had charge, and I think extending over that period, will show that we have not had any trouble on Fourth Street.

205 Q. What would be the effect if a heavily loaded freight train coming down Fourth Street just south of the City Hall, and control should be lost of the engine?

A. Well, you would probably have a run-a-way, unless the trainmen could get the train under control.

Q. It would be very hard to get it under control if it ever started?

A. If it got to running at a rapid rate of speed, yes, over 10 or 15 miles an hour it would be difficult.

Q. Have you ever stood at the corner of one of the business streets while a long freight train of your company was crossing?

A. I have, yes, sir.

Q. Kept you waiting considerable time?

A. Yes.

Q. Congested traffic?

A. Some little time.

Q. Piled up street-cars?

A. Well, I would not say piled them up, but I have seen—

Q. I mean backed them up.

A. I have seen two or three cars—might be bunched.

Q. Do you know how many cars cross your track every minute?

A. What track—Fourth Street?

Q. Yes.

A. At what point?

Q. Taking all the points—

A. No, I don't know.

Q. Have you any idea?

A. No, but I know that there are quite a number.

206 Q. Have you ever been in a council chamber during a session when the train went by, going either way?

A. I don't think so.

Q. Have you ever been in either of the court rooms at the courthouse?

A. No, I don't think so, when a train passed. I don't recollect that I have.

Q. Have you ever been in any of the stores along Fourth Street—that face on Fourth Street?

A. No, I don't think so.

Q. Have you ever been on the east side of the Chamber of Commerce Building—up clear to the top—when a train came?

A. Yes, sir.

Mr. FENTON: West side.

Q. West side, yes. Have you felt a distinct vibration?

A. No, I never noticed,—not any vibration of the building, though I have been to the extreme top of the building—I should say, the third or fourth story—when trains have passed.

Q. This grade that you have on Fourth Street—what would be generally termed as a mountain grade, isn't it?

A. Yes.

Q. Worst grade in that state, isn't it? Or railroad grade?

A. It is about as heavy as we have got in the state—grades that I know of—of steam line hauling quite a large volume of traffic.

Q. Do you remember an interview that was published from you in the Portland Journal on October 26, 1908, relating to this subject, wherein you spoke of this grade?

A. I don't remember the particular interview.

Q. Do you remember whether or not you told the reporter that it was the worst grade in the state?

A. I don't think I ever made such a statement.

Q. If it were published, it was a mistake?

A. Well, I have seen things in the Journal that would not bear investigation—a good many.

Q. Now, as a matter of fact, Mr. O'Brien, don't you think that electric power would be much more feasible on Fourth Street than steam, even for the company?

A. No, I do not.

Q. Less expensive?

A. I think the economy in operation would depend largely on what you would have to pay for your Juice.

Q. Well, as to the travelling—as to the number of passengers that could be carried. If you had a line that was local along Fourth Street, wouldn't that be considerably—

A. Do you refer to a city line or interurban line?

Q. I intend to refer to both.

A. That would depend entirely on the amount of service that would be provided.

Q. Haven't the local and suburban lines that have been lately constructed proven lucrative, like the line to Salem?

A. I have not seen any statement of their earnings—don't know very much about their operation. I don't think their present earnings, though, should be considered, because they are under practically

no expense at the present time. They have a brand new line, their maintenance charge is exceedingly low compared to what it will be in the course of four or five years.

208 Q. On the basis of approximately five to one—the expense on Fourth Street over what it would be if on a level line—on the East Side line—your line on Fourth Street is not a very profitable line, is it?

A. No, I don't think it is. This operation of it over this portion between Portland, or the Union Depot and the top of the hill—Bertha, as we call it.

Q. The bells on the train ring during most of the way, do they not?

A. Yes, sir.

Q. They puff loudly going up?

A. When they get on the heavy grade, and the engines are working hard, yes.

Q. They puff all the way from the depot up—more or less grade, is there not?

A. More or less.

Q. Don't you know, as a matter of fact that causes considerable inconvenience to the residents along that street? Haven't complaints come to you at different times about it?

A. I have had no—no complaints have ever been made to me in regard to the matter.

Q. You never lived on Fourth Street, did you?

A. No sir.

Q. Has control ever been lost of trains on that, do you know?

A. Not to my knowledge, since I have had charge of the line.

Q. Well before?

Mr. FENTON: It would be hearsay if there was. I object to that.

COURT: Ask Mr. O'Brien if he knows. Unless he knows,
209 he would not be competent to testify.

Q. I will ask, then, Mr. O'Brien, if you know whether control has ever been lost of an engine on that line.

A. I don't know. I know no cases have ever been reported to me.

Q. You consider gasoline feasible to take care of the passenger traffic on there?

A. With the large cars and the power that they have been equipped with—the cars they are turning out today—I do.

Q. With some of the equipment that you lately received—your company—do you think that could handle it, or pull it up?

A. I think so. They are building cars with more power. The cars we received recently are 200 horse power. They are building cars of 300 horse power. There should be no difficulty at all.

Q. Is not electricity much more powerful than steam in climbing ascents and grades?

A. I am not competent to pass on that.

Q. Do they not often run grades absolutely impracticable for steam?

A. I don't think so. I don't know of any.

Q. Like Portland Heights?

A. Well, Portland Heights is simply a question of getting the proper kind of locomotive. We can get over the Portland Heights grade.

Q. You would have to have the proper kind of equipment?

A. Yes, have to have geared locomotives.

Redirect examination:

210 Q. Speaking of this matter of cars, gasoline is power isn't it?

A. Yes, sir.

Q. You could not operate passenger traffic over this line from Corvallis to Portland with this, could you?

A. No, sir.

Q. Simply suburban?

A. Probably a short distance—30 or 40 mile radius of the city.

Q. Then have to connect up and transfer your passengers to a steam line?

A. Yes, sir.

Q. And as to freight business, you could not handle it at all?

A. No sir.

Q. And that would be true with reference to electric service, wouldn't it?

A. Well, you could extend your electric service as far as you want to, as far as that is concerned.

Q. As to the operation and movement of passengers—does that apply also to freight?

A. I don't quite catch the point.

Q. I mean you could handle passenger traffic like the Oregon Electric, but could you handle freight?

A. Yes, we could with electricity.

Q. That would require a large expenditure of money?

A. Yea, sir.

Q. Power houses at frequent intervals?

A. Yes, sir.

Q. I will ask you to state if these engines that are used are now oil burners, or whether any cinders or anything of that kind?

A. Yes, sir, all equipped with oil—using oil.

211 Q. Do they emit any cinders or anything of that kind?

A. No cinders.

Q. Now, the counsel spoke about a bell ringing on these engines as they come down the street. What is the fact as to that being a method of giving signals to people at street crossings?

A. The bells are rung in order to warn the people that a train is coming.

Q. Is there any other way of giving signals of the approach of trains?

A. No, unless sounding the whistle, which is objectionable in a city.

Q. Do you know whether or not that is required by ordinance here?

A. I could not say. I think it is.

Q. What percentage is passenger traffic and what percentage is freight traffic in earnings, of this traffic from Corvallis to Portland, roughly speaking?

A. Oh, I should not say over twelve or fifteen percent.

Q. Which is which?

A. Twelve or fifteen per cent of the total on the West Side lines—

Q. Is freight. No, you don't understand my question. What is the relative percentage of freight and passengers of the total business on the West Side line; that is, which is the heaviest percent—the freight traffic or the passenger—in earnings.

A. Off hand, I should say it would be divided, 60 per cent passenger and 40 per cent freight.

Q. You have an opportunity to know from the monthly report of the earnings, as to about what it is?

A. I don't think our accounts are kept so that it shows—gives that information so far as our branch lines are concerned, but I based my opinion on what I have seen of the traffic.

Q. Volume of traffic.

A. Volume of the traffic.

Q. You are familiar with the traffic?

A. Yes, sir.

Q. And you say 40 per cent would be freight, and 60 percent passenger?

A. Yes, sir.

Excused.

Adjourned until Thursday, Dec. 2, 1909, 10 A. M.

213 PORTLAND, ORE., December 2, 1909—10 a. m.

Mr. FENTON: I offer plaintiff's exhibit "A" which was identified by the witness Gaston as a fairly correct map of the location of the City of Portland. I offer this with the promise to further identify certain streets, railroad tracks, thereon, as a correct delineation of the situation on the ground.

Map Marked Complainant's Exhibit "A."

Mr. KAVANAUGH: I would like to formally object as not properly identified.

214 RICHARD KOEHLER, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Koehler, how long have you been connected with the property known as the Oregon and California Railroad Company and the Southern Pacific Company and when did you first become connected with these properties and in what capacity were you so connected? What official positions did you hold from time to time and up to the present time, giving a succinct statement of your official relation

to this property and particularly the property known as the West Side division of the Oregon and California Railroad Company from the Union Depot to Corvallis by the way of Fourth Street.

A. I came here in 1874 as financial agent for the bondholders of the Oregon and California Railroad Company and was then appointed Chief Engineer for the Oregon and California Railroad Company and Auditor. In 1876 I was made Manager and I also held the position as Vice President. In 1876 the bondholders whom I represented acquired some interest in the West Side Road, the Oregon Central Railroad of Portland. It was then built from Portland to St. Joseph and I had from 1876—I believe it was in September, anyhow in the fall—I had supervision over this property also. In 1880 the Oregon Central Railroad Company's property was purchased by the Oregon and California Railroad Company and from thence on it was known as the West Side Division of the Oregon and

215 California Railroad Company. In 1879 we built under an independent corporation, an extension of the Oregon Central Railroad from St. Joseph by way of McMinnville to Corvallis, which, in 1880, was likewise acquired by the Oregon and California Railroad Company and during the year 1880 we also built the Lebanon branch from Albany to Lebanon. And in 1881 we started in on the extension on the main line of the Oregon and California from Roseburg to the boundary line of the state. This extension was built during the years 1881, 1882, and 1883, and Ashland was reached early in 1884. During all this time I was a corporate officer of the Oregon and California Railroad Company and the General Manager, and I remained so until September, 1904. There was however, a period intervening in which the property of the Oregon and California Railroad Company was in the hands of a receiver and I was appointed receiver at that time, and as receiver I was also appointed manager and continued to manage this property during the receivership which lasted until June 11, 1888. Since September, 1904, I hold the position of General Purchasing Agent for the Oregon Railway and Navigation Company and the Southern Pacific Companies lines in Oregon. In—

Q. Now, as general— Go ahead.

A. On July 1, 1887, the lease was made by which the Oregon and California Railroad Company leased its property to the Southern Pacific Company and under this lease I managed as Manager for the Southern Pacific Company's Oregon lines, the property on behalf of the Southern Pacific Company until September, 1904, as above stated.

Q. During the time that you were an officer of the Oregon and California Railroad Company what position did you hold?

A. As stated, I was first Auditor and Chief Engineer until 216 1876, when I was appointed manager.

Q. You were Vice President how long?

A. I was also Vice President during the entire period except for a very short interval; at one time for a year or so I was President of the company.

Q. Now during the time that you were Vice President and Presi-

dent, you were also—were you a member of the Board of Directors of the Oregon and California Railroad Company?

A. Of the Oregon and California?

Q. Yes.

A. Yes.

Q. I also desire to show to you journal of minutes of the Oregon Central Railroad Company, Volume 4, and will ask if, during the time you were an officer of the Oregon and California Railroad Company, a member of its Board of Directors after October 6, 1880, this document came into the custody of the secretary of the Oregon and California Railroad Company and the custody of the Oregon and California Railroad Company and its Board of Directors, as the official record of the minutes of the Oregon Central during the time it purports to cover, and if you recognize that as the minute book?

A. Which document do you refer to?

Q. I refer to the one beginning—

A. This is a transfer.

Q. Here: "The Secretary then read the following communication from the President of the Oregon and California Railroad Company" beginning with the words "The Secretary then read the following communication from the President of the Oregon and California Railroad Company", found at page 75 of this minute book No. 4.

Mr. FENTON: Some question was made, Your Honor, about 217 the sufficiency of the proof of these corporate minutes.

Q. And to and inclusive of page 99, down to the signature of T. R. Cornelius, President O. C. R. R. Co.

A. Yes, I remember the transaction.

Q. Were these the corporate records of the Oregon Central Railroad Company?

A. Yes.

Q. Do you know the signature of A. G. Cunningham, Secretary, and also T. R. Cornelius, President?

A. I do.

Q. Do you recognize the signature at page 99 as the signature of A. G. Cunningham, the secretary of the Company?

A. Yes.

Q. Do you know the signature of T. R. Cornelius, President of the Oregon Central Railroad Company?

A. Yes.

Q. Do you recognize that as his signature?

A. Yes.

Q. And you recognize that as the book of minutes—

A. I do.

Q. No. 4 of the Oregon Central Railroad Company.

Mr. FENTON: Will you consider these read? I want to read them into the record and withdraw them.

Mr. KAVANAUGH: I would like to know them.

Mr. FENTON: I will read them now.

Marked Complainant's Exhibit "F".

COMPLAINANT'S EXHIBIT "F."

Minutes of the Oregon Central R. R.

OFFICE OF THE OREGON CENTRAL RAILROAD COMPANY,
PORTLAND, OREGON, WEDNESDAY, Sept. 8, 1880.

In pursuance of notice and in accordance with the By-Laws, the Board met at 11 o'clock a. m., Members present:

T. R. Cornelius, C. H. Lewis, J. N. Dolph, R. Koehler, C. A. Dolph, Medorum Crawford and S. F. Chadwick, 7.

T. R. Cornelius, President, called the meeting to order.

* * * * *

The Secretary then read the following communication from the President of the Oregon & California Railroad Company.

OFFICE OF THE OREGON & CALIFORNIA RAILROAD CO.,
PORTLAND, OREGON, September 8, 1880.

To the President and Board of Directors of the Oregon Central Railroad Company.

GENTLEMEN: I have the honor to submit to you on behalf of the Oregon & California Railroad Company, a corporation duly incorporated and existing under the laws of Oregon, a proposition for the purchase by said Oregon & California Railroad Company, of all the property, real, personal and mixed, of your company, the Oregon Central Railroad Company, at the price and consideration of the payment by the said Oregon & California Railroad Company of the bonded debt of the said Oregon Central Railroad Company, its debt to said Oregon & California Railroad Company not bonded, and its floating indebtedness, understood by said Oregon & California Railroad Company to be in amount as follows:

Amount due on the promissory notes of your company
219 now outstanding and unpaid, one executed Feby. 9th, 1872, to Ben Holladay President, for \$500,000 with interest at ten per cent per annum, and one note for \$500,000 executed by your Company Aug. 29th, 1872, to Ben Holladay, President, drawing ten (10) per cent interest, and for the payment of which all the first mortgage bonds of your Company are pledged, the interest being computed at five per cent only from and after the execution of the agreement of April 6th, 1876, between Milton S. Latham, Agent, and Henry Villard, Agent; amount due upon the second mortgage bonds of your Company, principal \$300,000 with interest.

This Company, however, reserving the right to pay and satisfy the interest and principal of any of said second mortgage bonds only at maturity and should said bonded or secured indebtedness by any different computation on interest be found to be greater than above estimated, this Company to assume pay and satisfy the same nevertheless, and should the same be found to be less in amount, this Company not to be required to pay any greater sum for said property.

Amount due on account with Oregon & California Railroad Company, \$120,472.02.

Amount due on account construction and improvements, \$13,006.52.

This proposition is submitted by authority of resolutions passed by the Board of Directors of the Oregon & California Railroad Company at a meeting thereof held this 8th day of Sept. 1880, at the office of the Company in Portland, Oregon, of which the following is a copy.

Resolved, that this Company propose to the Oregon Central Railroad Company of Portland to purchase all the property of
220 said Oregon Central Railroad Company of every name and nature, real, personal and mixed and as a consideration therefor to pay off and satisfy the bonded debt of said Company, the debt of said Company to this Company and its floating indebtedness in amount as follows: to-wit:

Amount due on the promissory notes of said Company now outstanding and unpaid, one executed Feby. 9th, 1872, to Ben Holladay, President, for \$500,000 with interest at 10 per cent per annum and one note for \$500,000 executed by said Company Aug. 29th, 1872, to Ben Holladay, President, drawing ten (10) per cent interest/ and for the payment of which all the first mortgage bonds of said Company are pledged, the interest being computed at five per cent only from and after the execution of the agreement of April 6th, 1876, between Milton S. Latham, Agent, and Henry Villard, Agent; amount due upon the second mortgage bonds of said Company, principal \$300,000 with interest.

This Company, however, reserving the right to pay and satisfy the interest and principal of any of said Second Mortgage Bonds only at maturity and should said bonded debt or secured indebtedness by any different computation of interest be found to be greater than above estimated, this Company to assume pay and satisfy the same nevertheless, and should the same be found to be less in amount, this Company not to be required to pay any greater sum for said property.

Amount due on account with Oregon & California Railroad Company \$120,472.02.

Amount due on account of construction and improvements \$13,006.52.

Resolved, that the President of this Company be and he
221 is hereby authorized and directed to make in the name of and in behalf of this Company to the said Oregon Central Railroad Company a proposition for the purchase of all the property of said Oregon Central Railroad Company, real, personal and mixed and to pay therefor the indebtedness of said Oregon Central Railroad Company as aforesaid.

An early reply to the foregoing is desired.

Respectfully yours,
(Signed)

R. KOEHLER,
President of the Oregon &
California Railroad Company.

Mr. J. N. Dolph moved that the communication just read be read upon the journal, seconded by Mr. Koehler and passed.

Mr. J. N. Dolph then offered the following preamble and resolutions:

Whereas, The Railroad of this Company has now been in operation for eight years and

Whereas, The earnings of the road have hitherto been insufficient to enable this Company to pay anything upon the principal or interest of its indebtedness incurred for its construction, and

Whereas, This Company is unable to pay its indebtedness by the earnings of its property and the proceeds of sale of its lands, and if pressed by its creditors would have long since been compelled to discontinue operations, and

Whereas, In the judgment of this Board it is for the best interests of this Company that the proposition of the Oregon & California Railroad Company to purchase the property of this
222 Company should be accepted.

Resolved, That the said proposition of the Oregon & California Railroad Company be and the same is hereby accepted by this Board subject to ratification and approval by a Stockholders' meeting of his Company to be called for that purpose.

Seconded by Mr. Koehler and passed, and declared by the President unanimously adopted.

Mr. J. N. Dolph moved that a committee of three be appointed to investigate the indebtedness of this Company and report to the Stockholders' meeting to — called by resolution of this Board and that the Secretary of this Company shall be one of such committee; seconded by Mr. Koehler and passed.

The President then appointed Mes. C. H. Lewis and C. A. Dolph with the Secretary of this Company as such Committee.

Mr. J. N. Dolph then offered the following resolution:

Resolved, That a meeting of the Stockholders of this Company be and the same is hereby called to be held at the office of this Company in the City of Portland, Oregon, on the 6th day of October, 1880, at 11 o'clock A. M., of said day for the purpose;

First. To Consider a proposition of the Oregon & California Railroad Company, a corporation under the laws of Oregon to purchase all the propser-y, real, personal and mixed of his Company.

Second. To consider the propriety of and to authorize the dissolution of this Company the Oregon Central Railroad Company of Portland, and the settling of its business, and the disposing of its property and the dividing of its capital stock.

Third. To authorize the sale and conveyance or other disposition of the Company's property and the liquidation of its affairs.

223 Resolved, That the Secretary of this Company be and he is hereby directed to give notice of the time, place and object of such meeting of the Stockholders of this Company by publishing a notice thereof stating the time, place and object of such meeting in the Daily Oregonian a newspaper of general circulation printed and published in the City of Portland, Oregon, daily (Sundays excepted) for at least Twenty days prior to said meeting, and by

mailing to each Stockholder of this Company whose post office address or usual place of residence is known to the Secretary of this Company, directed to his usual place of residence, a written or printed notice thereof under his official signature and the corporate seal of this Company.

Seconded by Mr. Koehler and passed and declared by the President unanimously adopted.

No further business being before the Board, Mr. J. N. Dolph moved that when this Board do adjourn it be to the 6th day of October, 1880, at 10:30 o'clock A. M., of said day. Seconded by Mr. C. A. Dolph and passed.

Mr. J. N. Dolph then moved that the Board do now adjourn, seconded by Mr. Lewis, and passed.

The President declared the Board adjourned to the 6th day of October, 1880, at 10:30 o'clock A. M.

T. R. CORNELIUS.

A. G. CUNNINGHAM, *Secretary*.

224 Q. I will ask you to look at page 80 and see if you recognize the signature of T. R. Cornelius, President, and A. G. Cunningham, Secretary, and if they are the signatures to those minutes of these gentlemen, respectively.

A. Yes, I do recognize them as the signatures of the gentlemen mentioned.

Q. You were present at those meetings?

A. Yes.

Q. And participated as a director?

A. Yes.

Mr. Fenton continues reading Exhibit "F".

225 OFFICE OF THE OREGON CENTRAL RAILROAD COMPANY,
PORTLAND, OREGON, WEDNESDAY, Oct. 6th, 1880.

Pursuant to adjournment the Board of Directors of this Company met at the office of the Company on this 6th day of October, 1880, at 10:30 o'clock A. M.

Members present: R. Koehler, J. N. Dolph, C. A. Dolph, S. F. Chadwick, C. H. Lewis, T. R. Cornelius, M. Crawford, 7.

All the members present.

T. R. Cornelius, President, called the meeting to order at 10:35 A. M.

The Secretary read the proceedings of the last meeting and no objection being made, they stand approved.

Mr. J. N. Dolph moved that the Board now take a recess until 11:30 o'clock A. M., seconded by Mr. Koehler and adopted; the President announced a recess until 11:30 o'clock A. M.

Called Meeting of the Stockholders.

OFFICE OF THE OREGON CENTRAL RAILROAD COMPANY,
PORTLAND, OREGON, WEDNESDAY, Oct. 6th, 1880.

Pursuant to resolution duly passed by the Board of Directors of this Company at a meeting thereof duly called and held at the office of this Company September 8th, 1880, calling a special meeting of the Stockholders of this Company to be held at this time and place, and declaring the purpose thereof, which resolutions are spread upon the records of the minutes of said meeting, and in pursuance of notice to the Stockholders of this Company duly given to each stockholder as provided by the By-Laws of this Company by mailing to each Stockholder a printed notice thereof signed by the Secretary and under the corporate seal of the Company giving the time and place of this meeting and specifying the object thereof, which notices were mailed and deposited in the post office at Portland, Oregon inclosed in a sealed envelope, and the package pre-paid and properly addressed to each Stockholder at his place of residence, as to be received by each Stockholder by usual course of mail more than twenty days prior to this date, and which notices were also registered and sent as registered packages, all of which will more fully appear by the affidavit of the Secretary of this Company, this day filed and exhibited to the Board, which notice and affidavit are in words and figures as follows, to-wit:

"Notice of Stockholders' Meeting.

OFFICE OF THE OREGON CENTRAL RAILROAD COMPANY,
PORTLAND, OREGON, September 8th, 1880.

To ———, a stockholder of the Oregon Central Railroad Company of Portland:

Please take notice that at a meeting of the Board of Directors of this Company duly called and held at the Company's office in the City of Portland in the State of Oregon on the 8th day of September, A. D., 1880, the following resolutions were unanimously adopted, to-wit:

Resolved, That a meeting of the Stockholders of this Company be and the same is hereby called to be held at the office of this Company in the City of Portland, Oregon, on the 6th day of October, 1880 at 11 A. M., of said day for the purpose—

First. To consider a proposition of the Oregon & California Railroad Company, a corporation under the laws of Oregon, to purchase all the property, real, personal and mixed of this Company.

Second. To consider the propriety of and to authorize the dissolution of this Company, the Oregon Central Railroad Company of Portland, and the settling of its business, and the disposing of its property and the dividing of its capital stock.

Third. To authorize the sale and conveyance of other disposition of the Company's property and liquidation of its affairs.

Resolved, That the Secretary of this Company be and he is hereby directed to give notice of the time, place and object of such meeting of the Stockholders of this Company by publishing a notice thereof stating the time, place and object of such meeting in the Daily Oregonian, a newspaper of general circulation printed and published in the City of Portland, Oregon, daily, Sundays excepted, for at least twenty days prior to said meeting and by mailing to each 228 Stockholder of this Company whose Post Office address or usual place of residence is known to the Secretary of this Company directed to his usual place of residence a written or printed notice thereof under his official signature and the corporate seal of this Company.

You are therefore hereby notified in pursuance and by authority of said resolutions and in conformity to section 19 of chapter 7, Title 1, of the General Laws of Oregon, that a special meeting of the Stockholders of this Company, the Oregon Central Railroad Company will be held at the office of the Company in Portland, Oregon, on the 6th day of October, A. D., 1880, at 11 o'clock A. M., of said day.

The objects for which said meeting is called are as follows:

First. To consider a proposition of the Oregon & California Railroad Company, a corporation under the laws of Oregon, to purchase all the property, real, personal and mixed of this Company.

Second. To consider the propriety of and to authorize the dissolution of this Company, the Oregon Central Railroad Company of Portland, and the settling of its business, and the disposing of its property, and the dividing of its capital stock.

Third. To authorize the sale and conveyance or other disposition of the Company's property and the liquidation of its affairs.

Yours respectfully,

A. G. CUNNINGHAM,

Secretary of the Oregon Central Railroad Company."

229 *Affidavit of Secretary to Mailing of Notices, etc.*

STATE OF OREGON,

County of Multnomah, ss:

I, A. G. Cunningham, being first duly sworn, say that I am the duly elected, qualified and acting Secretary of the Oregon Central Railroad Company, a corporation duly incorporated under the laws of the State of Oregon and that I served the notices of the special meeting of the Stockholders of said Oregon Central Railroad Company called for the hour of eleven o'clock A. M., of the 6th day of October, A. D., 1880, which notice was under my official signature and corporate seal of said Company (and of which notice except the name of the Stockholder, which was inserted a copy thereof is hereto attached marked exhibit "A") upon each and all of the Stockholders of this Company, that I served said notices by mailing the same at the post office in the City of Portland, Oregon, enclosed in a sealed envelope and the postage prepaid thereon, and the same

y addressed to each of said Stockholders at his place of residence
 furnished by said Stockholder to the Secretary of this Company
 ascertained by the Secretary and that I registered each of said
 ers and by mailing at said post office in like manner like notices
 the agents and Attorneys of said Stockholders when known to the
 npany or any officers thereof, that I took the receipts of the post-
 ster at Portland for said registered letters which I herewith file;
 t said letters were mailed at Portland, aforesaid, to the follow-
 named Stockholders and Agents at the dates and addressed as
 ows to-wit:

	Name.	Address.	No. of registered Rect.
t. 11.	S. C. Adams.....	Salem, Oregon.....	1135
"	J. C. Ainsworth.....	Oakland, Cal.	1150
"	J. C. Ainsworth.....	Portland, Oregon.....	1087
"	C. A. Burchardt.....	Portland, "	1088
"	W. Baldr.....	Hillsboro, "	1112
"	Stephen Bland.....	Forest Grove, "	1095
"	Hy Buxton, Jr.....	do " .....	.....
"	C. Bills, Estate.....	Portland, "	1086
"	Eliza Best.....	Fidalgo, W. T.....	1191
"	Jas. R. Boyce, Estate..	Hillsboro, Oregon.....	1114
"	William Ball.....	North Yamhill, "	1132
"	Geo. H. Burnett.....	Salem, "	1134
"	Wm. Barrett.....	Forest Grove, "	1110
"	T. R. Cornelius.....	Cornelius, "	1093
"	M. Crawford.....	Dayton, "	1128
"	Wm. Campbell.....	McMinnville, "	1106
"	Margaret Ann Conklin..	Hillsboro, " .....	.....
"	Kenyon Crandall....	Cornelius, "	1092
"	E. Comstable.....	Hillsboro, "	1115
"	T. I. Carter.....	Baker City, "	1136
"	S. Coffin.....	Dayton, "	1129
"	Oliver Clay.....	Portland, "	1084
"	Wm. Cree, Estate....	do "	1083
"	S. F. Chadwick.....	Salem, "	1133
"	F. Dekum.....	Portland, "	1082
"	J. C. Dobbins.....	Cornelius, "	1090
"	J. N. Dolph.....	Portland, "	1081
t. 27.	C. A. Dolph.....	do "	1441.
t. 11.	Geo. W. Ebberts.....	Hillsboro, "	1116
"	J. A. Fisher.....	East Portland, "	1089
t. 11.	Phenemon S. Field...	Forest Grove, Oregon.....	.....
"	John S. Griffin.....	Hillsboro, "	1117
"	James H. Gaunt.....	McMinnville, "	1105
"	John Green.....	Portland, "	1080
"	John Harrison Estate..	Cornelius, "	1091

"	A. B. Hallock.....	Portland,	"	.....	1079
"	S. A. Halcomb.....	Hillsboro,	"	.....	1118
"	Thos. Hart.....	do	"	.....	1119
"	Wm. L. Halsey,				
"	c/o E. Quackenbush..	Portland,	"	.....	1078
"	Jacob Halstead.....	Hillsboro, and			
		New Tacoma, W. T.		.....	1143
"	J. M. Johns.....	Weston,	Oregon	.....	1202
"	Hyer, Jackson.....	Hillsboro,	"	.....	1121
"	A. H. Johnson.....	Portland,	"	.....	1077
"	Jacob Kamm.....	Portland,	"	.....	1076
"	R. Koehler.....	do	"	Personal	
"	R. Koehler, Trustee...	do	"	do	
"	J. W. Ladd.....	do	"	.....	1075
"	W. S. Ladd.....	do	"	.....	1075
"	Labbe Bros.....	do	"	.....	1074
"	Jos. Leonard.....	do	"	.....	1073
"	C. H. Lewis.....	do	"	.....	1072
"	Walter Noffatt Estate..	do	"	.....	1071
"	J. Myrick.....	Baker City,	"	.....	1137
"	D. Monastes.....	Portland,	"	.....	1069
"	S. H. Marsh.....	Forest Grove	"	.....
"	Wm. Manzy.....	West Union,	"	.....	1144
"	Norman Martin.....	Sauve Island,	"	
"	Jesse C. Moore.....	Greenville,	"	1107
"	J. H. Mitchell.....	Portland,	"	1068

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Sept. 11.	Chas. McKinney.....	Hillsboro,	Oregon	1122
"	David McDonald Estate				
	c/o Mrs. Miller....	Dilley,	"	1147
"	McCracken, Merrill & Co.,	Portland,	"	.....	1066
"	W. T. Newby.....	McMinnville,	"	.....	1104
"	J. B. Newby.....	do	"	.....	1104
"	E. J. Northup & Co....	Portland,	"	.....	1066
"	A. De Grogier Portales				
	c/o G. W. Weidler..	do	"	.....	1065
"	L. Patterson.....	Hillsboro,	"	.....	1123
"	S. G. Reed.....	Portland,	"	.....	1064
"	C. A. Reynolds.....	Forest Grove,	"	.....
"	J. M. Richey.....	Coyoto Creek,	"	.....
"	do	Oakland,	"	.....
"	Thos. Standley,				
	c/o W. T. Newby...	McMinnville,	"	.....	1104
"	B. E. Steward Estate..	Forest Grove,	"	.....	1130
"	D. C. Stewart.....	North Yamhill,	"	.....
"	Jos. S. Smith.....	Portland,	"	.....	1062
"	Geo. H. Smith.....	Hillsboro,	"	.....	1125
"	Albert Simpson.....	Forest Grove,	"	.....
"	Henry Sewell Estate..	Hillsboro,	"	.....	1125
"	R. R. Thompson.....	Alameda, Cal.		.....	1149

"	Henry B. Tucker.....	Beaverton,	Oregon.....	1146
"	L. H. Tongue.....	Hillsboro,	"	1128
"	Hans Thielsen.....	Portland,	"	1059
"	J. B. Underwood.....	Eugene City,	"	1145
"	G. W. Vaughn Estate.	Portland,	"	1060
"	J. W. Watts.....	Oregon City,	"	1138
"	C. A. Westfall.....	Hillsboro,	"	1127
"	Peyton Wilkes.....	Greenville,	"	1108
"	Elkana Walker Estate.	Forest Grove,	"	1099

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Sept. 11.	Jemina Wheeler Estate.	Santa Rosa, Cal.	1148
"	Jabez Wilkes.....	Greenville, Oregon.....	1109
"	C. M. Wibert.....	Portland, Oregon.....	1057
"	J. A. Strobridge.....	do	1058

I further swear that a notice of said special Stockholders' meeting of which a copy hereto attached marked "B" was duly published in the "Daily Oregonian" a newspaper of general circulation printed and published daily, Sundays excepted, in the City of Portland, for 28 successive days, the first insertion being on the 9th day of September and the last insertion being on the 6th day of October, 1880. I further state that I have received the receipts of all said persons, Stockholders and Agents for said registered packages returned to me through the Post Office, except those addressed to Hy Buxton, Forest Grove; Margaret Ann Conklin, Hillsboro; Phinemon S. Field, Forest Grove; Estate of S. H. Marsh, Forest Grove; Norman Martin, Sauve Island; C. A. Reynolds, Forest Grove; D. C. Stewart, North Yamhill and Albert Simpson, Forest Grove.

I furthermore swear that in each notice so mailed the name of the Stockholder or person to whom mailed was inserted in the blank space designed for the name.

[CORPORATE SEAL OF COMPANY.]

(Signed)

A. G. CUNNINGHAM,

Secretary of the Oregon Central Railroad Company.

Subscribed and sworn to before me this 6th day of October A. D., 1880.

[NOTARIAL SEAL.]

(Signed)

I. R. MOORES,

Notary Public in and for Oregon.

234 The Stockholders of this Company met at the office of the Company at Portland, Oregon on the 6th day of October at 11 o'clock A. M.

The President and Secretary present.

The Secretary of the Company presented a certified list of Stockholders of this Company as follows:

OFFICE OF THE OREGON CENTRAL RAILROAD COMPANY,
PORTLAND, OREGON, Oct. 6th, 1880.

I, A. G. Cunningham, Secretary, do hereby certify that the following is a true and correct statement of the Stockholders of this Company as shown by the Stock Ledger and Stock Certificates Books this date:

No. of certificate.	To whom issued.	Shares.	Amt. paid.
	S. C. Adams.....	2	50.00
15	J. C. Ainsworth....	6	500.00
	C. A. Burchardt....	5	500.00
86	W. Baldr.....	1	100.00
5/4 61/4	Stephen Blank....	8	225.00
44	Hy Buxton, Jr....	10	250.00
36	C. Bills.....	5	500.00
102	Eliza Best.....	5	500.00
98	Jos. R. Boyce.....	1½	50.00
3	William Ball.....	2	50.00
75	Geo. H. Burnett....	4	25.00
72	William Barrett....	12	.....
	T. R. Cornelius....	5	400.00
19/1 59/1	M. Crawford.....	2	200.00
35	William Campbell..	8	800.00
97	Margaret Ann Conklin	20	2,000.00
58	Kenzon Crandall...	2	175.00
235			
	E. Constable.....	1	100.00
19	T. I. Carter.....	5	500.00
29	S. Coffin.....	5	500.00
	O. Clay.....	2	12.50
34	Wm. Cree.....	5	500.00
42/1 54/1	S. F. Chadwick....	2	200.00
	F. Dekum.....	5	500.00
70	J. C. Dobbins.....	32	.....
49/1 56/1	J. N. Dolph.....	2	100.00
52/1 55/1	C. A. Dolph.....	2	100.00
6	Geo. W. Ebberts...	21	525.00
45/10 46/5	J. A. Fisher.....	15	750.00
	Phinemon S. Field.	5	125.00
9	John S. Griffin....	1½	150.00
	James S. Gaunt....	9	225.00
	John Green.....	5	100.00
	John Harrison....	10	250.00
27	A. B. Hallock....	5	500.00
59/5 60/5	S. A. Halcomb....	10	250.00
90	Thos. Hart.....	5	500.00
31	Wm. L. Halsey....	5	500.00
87	Jacob Halstead....	1	.....
94	J. M. Johns.....	24½	2,450.00
11/20 24/8	Hyer Jackson.....	28	500.00
47	A. H. Johnson.....	5	500.00

THE CITY OF PORTLAND.

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81	Jacob Kamm.....	5	500.00
38/1 58/1	R. Koehler	2	100.00
44/46555-5/8}			
47/2499 53/27 60/4}	R. Koehler, Trustee 49,195½		9,950.00
61/100 62/5 63/5}			
83	J. W. Ladd.....	5	500.00
236			
	W. S. Ladd.....	5	500.00
	Labbe Bros.	5	500.00
	Jos. Leonard.....	4	25.00
48/1 52/1	C. H. Lewis.....	2	100.00
28	Walter Moffat....	5	500.00
	J. Myrick.....	5	500.00
	D. Monastes.....	5	100.00
84	S. H. Marsh.....	1½	112.42
92	Wm. Manzey.....	2	250.00
73	Norman Martin....	5	100.00
64	Jessee C. Moore....	1	100.00
18	J. H. Mitchell.....	1	.....
101	Chas. McKinney...	7½	750.00
95	David McDonald...	4	900.00
	McCracken, Merrill		
	& Co.	5	500.00
20/3 21/3 22/3 23/3	W. T. Newby.....	12	300.00
	E. J. Northup & Co.	5	500.00
21/61/22/20	A. de Gorgur Port-		
	ales	81	8,100.00
67	L. Patterson.....	2	200.00
79	S. G. Reed.....	5	500.00
4	C. A. Reynolds....	4	100.00
9	J. M. Ritchey.....	15	1,500.00
14	Thos. Standley....	26	500.00
34	B. E. Stewart.....	2	50.00
35	D. C. Stewart.....	2	50.00
16	Jos. S. Smith.....	5	500.00
	Geo. H. Smith.....	8	200.00
	Albert Simpson....	1	18.75
	Henry Sewell.....	1	18.75
80	R. R. Thompson...	5	500.00
53	Henry B. Tucker...	6	600.00
88	L. H. Tongue.....	1½	.....
41	Hans Thielsen.....	1	100.00
74	J. B. Underwood...	1	.....
26	G. W. Vaughn.....	5	500.00
10	J. W. Watts.....	1	25.00
15	C. A. Westfall....	16	400.00
76	Payton Wilkes....	2	37.50
7	Alkana Walker....	2	50.00
	Jemima Wheeler...	1	100.00
	Jabez Wilkes.....	1	6.25
	Wiberg & Strobridge	3	300.00

49,800½ \$47,531.17

and that no transfers have been made on the books of this Company within the preceding ten days.

[CORPORATE SEAL.]

(Signed)

A. G. CUNNINGHAM,
Secretary.

Upon the roll of Stockholders being called the following named Stockholders, owning and holding the number of shares of the capital stock of this Company hereinafter stated were present or represented by duly authorized and constituted proxies and answered to their names as follows, to wit:

S. C. Adams, by R. Koehler, proxy.....	2	shares
T. R. Cornelius	5	"
M. Crawford	2	"
Wm. Campbell	8	"
S. Coffin by J. N. Dolph, proxy.....	5	"
O. Clay by R. Koehler, proxy.....	2	"
S. F. Chadwick.....	2	"
238 J. N. Dolph.....	2	shares
C. A. Dolph	2	"
J. A. Fisher	15	"
James H. Grant by R. Koehler, proxy.....	9	"
S. A. Holcomb	10	"
J. M. Johns.....	24 1/2	"
R. Koehler	2	"
R. Koehler, Trustee	49,195 5/8	"
Wm. Manzey	2	"
W. T. Newby by R. Koehler, proxy.....	12	"
J. B. Newby by R. Koehler, proxy.....	10	"
Thos. Standley by R. Koehler, proxy.....	26	"
Henry B. Tucker	6	"
Total	49,349 1/8	shares

being all the capital stock of the Company, excepting 655 1/8 shares not represented.

The President submitted to the meeting the following communication which upon motion was ordered spread upon the records of this meeting and is as follows, to-wit:

OFFICE OF THE OREGON CENTRAL RAILROAD COMPANY,
PORTLAND, OREGON, Oct. 6th, 1880.

To the Stockholders of the Oregon Central Railroad Company.

GENTLEMEN: Upon the 8th day of September, last, I received a proposition from the Oregon & California Railroad Company to purchase of this Company all its property, real, personal and mixed, which proposition is herewith submitted as part hereof. Deeming it important that said proposition should be laid before the stockholders of this Company I called a meeting of the Board of

239 Directors, which meeting was held the 8th ult., and the proceedings of which are herewith submitted, for your consideration.

(Signed)

T. R. CORNELIUS,
President O. C. R. R. Co.

The Committee appointed at the Directors' meeting of the 8th September, 1880, submitted a report which upon motion of Mr. Koehler, seconded by Mr. Chadwick, was received and adopted, and ordered spread upon the record of the proceedings of this meeting, which report is as follows, to-wit:

To the President, Directors and Stockholders of the Oregon Central Railroad Company.

GENTLEMEN: The undersigned committee appointed in accordance with a resolution passed at the regular monthly meeting of your Board of Directors held on Wednesday the 8th day of September, 1880, to examine the books of said Company and report the result of such examination to the Stockholders' meeting called for the 6th day of October, 1880, beg to report that in accordance with said appointment they have made such examination and find the Ledger accounts to correspond with the balance sheet hereto attached marked exhibit "A" and the conditions of the Company to be as shown by statement of Liabilities and assets accompanying the same marked exhibit "B."

Upon a full examination of the operating accounts we find the gross earnings to be Five Hundred and Fourteen Thousand Seven Hundred and Seventeen and 20/100 Dollars (\$514,717.20) and the gross expenses to be Four Hundred and Seventy-six Thousand Fifty-nine and 39/100 dollars (\$476,059.39), giving a gain on the 240 operating account from opening of the road to the date of leasing to the Western Oregon Railroad Company on Sept. 1st, 1879, of Thirty-eight Thousand Six Hundred and Fifty-seven and 81/100 Dollars (\$38,657.81) and that the Company have received for rental of its road and equipment Twenty-three Thousand Two Hundred and Fifty Dollars (23,250.00) which together with the gain on operating account have been applied to payment of interest and expenditures not taken up in operating account and the final result to be a deficit or loss of nearly One Million Dollars as shown by exhibit "B" aforesaid.

Respectfully Submitted,
(Signed)

C. A. DOLPH,
C. H. LEWIS,
A. G. CUNNINGHAM,

Committee.

Portland, Oregon, Oct. 1st, 1880.

EXHIBIT A.

Oregon Central Railroad Company.

Ledger Balance, Sep. 30, 1880.

Dr.		Cr.
	Bills Payable	52 1,013,006.87
	Interest warrant, 2nd mortgage bonds	84 84,000.00
973,448.53	Profit and Loss	85
	Second Mortgage Bonds.....	91 300,000.00
	Oregon & California Railroad Co.	103 120,997.40
899.49	Cash	105
1,750.00	Western Oregon Railroad Co... 107	
58,882.17	Government Land Grant..... 109	
	U. S. Land Subsidy.....	111 79,116.79
	Coupon Interest, 2nd mortgage bonds	113 13,230.00
21,183.14	Land Department	115
1,166,984.02	Construction and equipment... 117	
	Bills payable interest acc't.... 545	612,796.34
<hr/> 2,223,147.35		<hr/> 2,223,147.35

Condition of Company as Shown by Balance Sheet Above.

Liabilities.

Bills payable (\$4,395,000 first mortgage bonds pledged for two notes of \$500,000 each of the account)	\$1,013,006.82
Interest on the two notes for \$1,000,000 at 10% to 6th Apr. '76, then 5% to date.....	612,796.34
	<hr/> 1,625,803.16

Second mortgage bonds.....	\$300,000.00
----------------------------	--------------

7% int. on bonds to 31 Aug. '80:

For int. warrant	\$94,500.00
Less paid by company	10,500.00
	<hr/> 84,000.00

Int. on coupons from maturity to date.....	97,230.00
	<hr/> 397,230.00
	120,997.40
	<hr/>

Oregon & California R. R. Co.....

\$2,144,030.56

Assets.

Construction and equipment (track and sidings 49.40 mi.).....	\$1,262,450.26	
Less individual subsidy	95,466.24	
W. S. Ladd subsidy (237,000 acres)	85,000.00	
Less Land Office fees & Ex.	5,883.21	
	<u>79,116.79</u>	
	174,583.03	1,087,867.23
Government lands, total value.....		<u>85,000.00</u>
Less:		
R'e'd cash on sales.....	4,934.69	
Maturing on sales	21,183.14	
	<u>26,117.83</u>	
Land Department for contract sales.....		58,882.17
Cash on hand		21,183.14
Western Oregon R. R. Co.		899.49
		<u>1,750.00</u>
		1,170,582.03
Balance, Deficit, Profit & Loss Balance sheet.....		<u><u>\$973,448.53</u></u>

Portland, Oregon, September 30, 1880.
(Signed)

A. G. CUNNINGHAM,
Secretary.

243 Upon motion of J. N. Dolph, seconded by Mr. Chadwick, the following preamble and resolutions were adopted by the following vote:

In favor of adoption.

Against adoption.

O. A. Dolph....	2	shares	S. A. Holcomb.....	10	shares
Wm. Manzey....	2	"			
J. N. Dolph.....	2	"			
J. A. Fischer....	15	"			
S. F. Chadwick..	2	"			
M. Crawford....	2	"			
H. B. Tucker...	6	"			
J. M. Johns.....	24½	"			
C. H. Lewis.....	2	"			
S. Coffin by J. N. Dolph, proxy.	5	"			
J. H. Grant by R. Koehler, proxy	9	"			
Walter Moffat by R. Koehler, proxy	5	"			
O. Clay by R. Koehler, proxy	2	"			
Thos. Standley by R. Koehler, proxy	26	"			
Wm. Campbell..	8	"			
S. C. Adams by R. Koehler, proxy	2	"			
J. B. Newby by R. Koehler, proxy	10	"			
R. Koehler	2	"			
W. T. Newby by R. Koehler, proxy	12	"			
R. Koehler, Trus- tee	49,195½	"			
T. R. Cornelius..	5	"			
<hr/> Total for.....			49,339½	<hr/> Total against.....	
				10 shares	

Whereupon said resolutions having received the vote of 49339½ shares of the capital stock of this company and that being the vote of more than (99/100) Ninety-nine One hundredths of all the capital stock of this Company the resolutions were declared
244 by the President of the Company to have been adopted by the meeting, said resolutions are as follows, to-wit:

Whereas, for the reason stated in the preamble of the resolutions of the Board of Directors of this Company passed at a meeting held Sept. 8th, 1880, a copy of which has been submitted to this meeting by the President of this Company, it is deemed by the Stockholders of this Company for the best interests of this Company to accept

the proposition of the said Oregon & California Railroad Company a corporation under the laws of Oregon, and having its principal office and place of business at Portland, Oregon; to purchase the property of this Company, real, personal and mixed now submitted to this meeting, and,

Whereas, in the judgment of the Stockholders of this Company the compensation offered to be paid for the property of this Company by said Oregon & California Railroad Company is greatly in excess of the real value of said property.

Resolved, That all the proceedings of the Board of Directors of this Company heretofore taken in relation to the said proposition of the said Oregon & California Railroad Company to purchase the property of this Company be and the same are hereby approved and confirmed.

Resolved, That the said proposition of the said Oregon & California Railroad Company to purchase the property of this Company be and the same is hereby accepted.

Resolved, That the President and Secretary of this Company be and they are hereby authorized and directed for the consideration offered by said Oregon & California Railroad Company to sell all the property, real, personal and mixed of this Company to
245 said Oregon & California Railroad Company.

Resolved, That the President and Secretary of this Company be and they are hereby authorized and directed in consideration of the covenant and agreement of said Oregon & California Railroad Company to assume, pay and discharge the indebtedness of this Company, be and they are hereby authorized and directed to execute and deliver to the said Oregon & California Railroad Company under their official signatures and the corporate seal of this Company a good and sufficient conveyance and transfer of all the railroad and road bed of this Company extending from Portland, Oregon, to St. Joseph, in Yamhill County, Oregon, a distance of 48 miles, together with all its lands, tenements and hereditaments acquired and appropriated for the purpose of a right of way for this Railroad, stations, depots and other possessions and all the appurtenances thereunto belonging. And also all its lands not heretofore conveyed acquired under and pursuant to the provisions of the Act of Congress of the United States of America approved May fourth, 1870, and entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon," and also its depots, engine houses, car houses, station houses, warehouses, machine shops, work shops, superstructure, erections and fixtures, and also all and singular the franchises, rights and privileges now owned, possessed by this Company.

And all lands, tenements, hereditaments and real estate acquired or appropriated whensoever and whatsoever or now owned by this Company.

And also all and singular the locomotives, tenders, passenger cars,

freight cars and all other cars, carriages, tools, machinery and equipments for said railroad now owned by this Company.

And also all goods and chattels now owned by this Company and in any way relating or pertaining or belonging to or connected with said Railroad, or running or operating the same or otherwise.

And also all bills receivable, notes, accounts, demands and choses in action of whatsoever nature belonging to this Company.

Resolved, That the dissolution of this Company the Oregon Central Railroad Company incorporated November 16, 1866, the settling of its business; the disposition of its property and the cancellation of its capital stock be and is hereby authorized and the Directors of this Company be and they are hereby directed to proceed to carry into effect the dissolution of this Company, the sale of its property, the settlement of its business and the cancellation of its capital stock as herein authorized.

Resolved, That upon such sale and transfer of the property of this Company the payment of its debts as hereinbefore provided, and the settling of its business, all outstanding certificates of stock be and they are hereby cancelled.

Resolved, That this Company the Oregon Central Railroad Company be and the same is hereby dissolved to take effect upon the transfer of the property of this Company and the settling of its business.

On motion of J. N. Dolph, seconded by S. F. Chadwick the meeting adjourned sine die.

Meeting of Directors Continued.

The Directors assembled at 11:30 A. M., after recess and at 12 o'clock noon the President called the board to order, same members present as before recess.

The President presented to the meeting the proceedings of the special meeting of the Stockholders of this Company this day held at the office of the Company and which were spread at large upon the minutes of the proceedings of said meeting which proceedings were read to the Board.

Whereupon, Mr. J. N. Dolph offered the following resolutions and moved their adoption, which motion being seconded by Mr. Crawford the resolutions were unanimously adopted, said resolutions are as follows to-wit:

Resolved, That all the proceedings of said meeting of the Stockholders of this Company this day held be and the same are hereby approved and confirmed by this Board.

Resolved, That the said proposition of the Oregon & California Railroad Company for the purchase of the property of this Company for the consideration of the covenant and agreement of the said Oregon & California Railroad Company to pay and discharge the indebtedness of this Company be and the same is hereby accepted and that the President and Secretary of this Company be

and they are hereby authorized and directed in consideration of the covenant and agreement of said Oregon & California Railroad Company to assume and pay the indebtedness of this Company, to execute and deliver to the said Oregon & California Railroad Company a good and sufficient conveyance and transfer, under their official signatures, and the corporate seal of this Company, all the Railroad and road bed of this Company extending from Portland, Oregon, to St. Joseph, in Yamhill County, Oregon, a distance of 48 miles, together with all its lands, tenements and hereditaments acquired and appropriated for the purpose of a right-of-way for its railroad stations, depots and other purposes, and all the appurtenances thereunto belonging, and also all its lands not heretofore conveyed under and pursuant to the provisions of the Act of Congress of 248 the United States of America approved May fourth, 1870, and entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon," and also its depots, engine houses, car houses, station houses, warehouses, machine shops, work shops, superstructures, erections and fixtures, and also all and singular the franchises, rights and privileges now owned and possessed by this Company.

And all lands, tenements, hereditaments and real estate acquired or appropriated wheresoever and whatsoever or now owned by this Company.

And also all and singular the locomotives, tenders, passenger cars, freight cars, and all other cars, carriages, tools, machinery and equipments for said railroad now owned by this Company.

And also all goods and chattels now owned by this Company, and in any way relating or pertaining or belonging to or connected with said Railroad, or running or operating the same or otherwise.

And also all bills receivable, notes, accounts, demands and choses of action of whatsoever nature belonging to this Company.

On motion of Mr. J. N. Dolph seconded by Mr. Koehler the Board adjourned without day.

T. R. CORNELIUS,
President O. C. R. Co.

A. G. CUNNINGHAM,
Secretary.

249 Q. A. G. Cunningham was Secretary of the Oregon Central Railway during this time, was he?

A. Yes sir.

Q. And T. R. Cornelius was president of the Oregon Central Railroad Company during this time, was he?

A. Yes sir.

Q. And Mr. J. N. Dolph and Mr. C. A. Dolph were the attorneys of the company—

A. Yes.

Q. —or the firm. I call your attention to journal of minutes of the Oregon Central Railroad Company No. 1, purporting to be a

meeting of the board of directors of the Oregon Central Railroad Company held July 2, 1870, page 112 of this book.

Mr. KAVANAUGH: What was the date?

Mr. FENTON: July 2, 1870.

Q. And extending to the middle of page 115, and which minutes purport to be signed by J. C. Ainsworth, secretary, and approved by J. Gaston, president, and will ask you if you recognize this as the original first volume of the minutes of the Oregon Central and the signature of J. Gaston, president, and J. C. Ainsworth, secretary.

A. Yes, I have seen this book quite often while I was in charge of the property the Oregon and California Railroad Company turned over to us. Of course I was not here in the city in 1870.

Q. Do you recognize the signature of T. R. Cornelius, vice president, page 112?

A. I do.

Q. Is that his genuine signature?

A. Yes.

Q. And do you recall the signature of J. C. Ainsworth, Secretary, the father of John C. Ainsworth?

250 A. Well, I have seen Mr. Ainsworth's signature, Mr. J. C. Ainsworth's signature quite a number of times but I could not with absolute certainty say this is the signature.

Q. It resembles that that you have acted upon?

A. Yes.

Q. And have you and the company acted upon that signature as the signature of John C. Ainsworth, secretary—treated it as such?

A. We have treated it as such, yes.

Mr. FENTON: I offer those pages.

Mr. KAVANAUGH: What is this?

Mr. FENTON: To show assent to act of Congress of May 4, 1870.

Mr. KAVANAUGH: The same objection and the further objection it is not properly identified.

Mr. FENTON: Do you want me to recall Mr. Gaston as to his signature, or will you admit that is his signature?

Mr. KAVANAUGH: I don't know his signature.

Mr. FENTON: I will recall him. I will bring in Mr. Ainsworth to prove his father's signature. I will read it with that promise.

Mr. KAVANAUGH: I don't think it is material.

Court: He may read it and you may save your exception.

Marked Complainant's Exhibit "G."

251

COMPLAINANT'S EXHIBIT "G."

OFFICE OF THE OREGON CENTRAL RAILROAD Co.,
PORTLAND, OREGON, July 2nd, 1870.

In pursuance of the call of the President of the Company, the Board of Directors met at their office in No. 3 Carters Block in this City at 8:00 o'clock P. M. of this day, and was called to order by the president at 9:30 P. M.

Present: J. Gaston, President, in the chair; T. R. Cornelius, J. B. Underwood, and J. C. Ainsworth.

Director Ainsworth moved to adjourn this meeting till Wednesday the 6th instant at 8:00 o'clock P. M.

Motion lost.

The President then presented the following resolution to-wit:

"Whereas on the 28th day of June, 1870, J. Gaston did take and subscribe twenty-three thousand five hundred shares of the Capital stock of this company, and

"Whereas such subscription was made to promote the best interests of the company,

"Therefore be it Resolved, that such subscription be and the same is hereby ratified and approved. Adopted by a majority, Ainsworth not voting.

2nd. Whereas, it is impossible for this company to comply with their contract heretofore made with the authorities of Washington County on or about the 5th day of March, 1868, and the amendment and extensions thereof,

Therefore, be it Resolved, that said contract is hereby cancelled so far as this company is concerned and the said County released from all liabilities thereon; And that the president of the company be hereby directed to notify the County Commissioners of said County of the action of this company, and serve a copy of this resolution on said Commissioners, and that the President also be hereby authorized to enter into an agreement in writing with said Commissioners to make good this action of this Board, and also to collect together all interest coupons signed by the officers of said County, and together with the County Clerk of said County, cause the same to be destroyed. Adopted.

3rd. Resolved that the Oregon Central Railroad Company hereby assents and expresses *their* assent and acceptance of all and singular of the provisions of the Act of Congress, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon," which Act was passed by the Senate of the United States on the 20th day of February A. D. 1870, and by the House of Representatives of said Congress on the 29th day of April, A. D. 1870, and that the president of this company be hereby authorized, empowered and directed to forward a copy of this resolution to the Secretary of the Interior at Washington City, D. C., and file the same in his office. Adopted.

4th. Resolved that a meeting of the stockholders of the Oregon Central Railroad Company of Portland, Oregon, be and the same is hereby called to be held at the office of the company in Portland, Oregon, on Saturday, the 9th day of July, A. D., 1870 at 7:00 o'clock

P. M. for the purpose of considering the propriety of, and authorizing the dissolution of such corporation, the settling of its business, disposing of its property, and the division of its capital stock, and any other business that may then be brought before said meeting. And that the president of this company be, and he is hereby authorized and directed to give notice of such meeting, and of the purposes thereof, by publication of the same in at

least five issues of the Daily Oregonian and daily Herald News, papers published in the City of Portland, Oregon; yeas and nays called for. Yeas, Cornelius, Underwood and Mr. President, 3. Nays, Ainsworth, 1. J. C. Ainsworth, as director, stockholder and bondholder protesting against the adoption of this resolution.

5th. Resolved that the Board do now adjourn to meet at the office of the company in Portland, on Saturday July 9th at 6:00 o'clock P. M., for the purpose of considering the propriety and authorizing the dissolution of this corporation, the settling of its business, disposing of its property, and the division of its capital stock, and for the purpose of transacting any other business that may then come before the Board. Yeas and Nays called for, resulting as follows:

Yeas: Cornelius, Underwood and Mr. President, 3.

Nays: Ainsworth, 1.

J. C. Ainsworth, as director, stockholder and bondholder protesting against the adoption of this resolution.

Approved:

J. GASTON,
President.

Attest:

J. C. AINSWORTH, *Sec'y.*

254 Mr. KAVANAUGH (Examining book and referring to some pages pasted in the book): What is this in here?

Mr. FENTON: That appears to be an entry in the handwriting of Mr. Gaston dated May 5, 1870, which should go over at page 112a. You can offer that. I didn't offer that myself. It has no relation to this matter.

Mr. KAVANAUGH: I will withdraw my objection to the identification, but still wish the other.

Mr. FENTON: That is, you admit that J. Gaston and J. C. Ainsworth are the genuine signatures and that they were such officers at that time.

Mr. KAVANAUGH: I will admit their signatures. I don't know whether they were officers.

Mr. FENTON: I will have to call Mr. Gaston to prove that.

Mr. KAVANAUGH: I think he testified to it.

Mr. FENTON: I don't recall. I may recall him to prove it. Now I will go on with Mr. Koehler.

Q. While we are on this subject of corporate records, I think—I show you volume No. 4, records of minutes of the Oregon and California Railroad Company, page 31.

A. Which company is that?

Q. Oregon & California. Down to and including directors' meeting of November 13, 1893, page 345, and ask if that was the record of minutes of the Oregon and California Railroad Company at that time of which company you were vice president at that time and of which company during that time Mr. George H. Andrews was secretary.

Mr. KAVANAUGH: What volume is that, Mr. Fenton?

Mr. FENTON: This is volume 4.

A. Four.

Mr. KAVANAUGH: Of the Oregon and California?

255 Mr. FENTON: Yes, I begin with page 1 down to page 345.

A. Yes. These are the records of the company.

Q. You recognize the signature of yourself throughout these minutes and of your Mr. Andrews as secretary where signed all through?

A. Just let me see.

Q. We will find the signatures somewhere.

A. Yes.

Q. They were the official minutes of the company during that time covered between these pages.

A. I find here the signatures instead of Mr. Andrews on part of the records, of W. W. Bretherton, assistant secretary.

Q. You recognize that as his signature?

A. I do, yes.

Q. You recognize the signature of George H. Andrews where that was signed?

A. Yes.

Q. And that was his signature?

A. Yes.

Q. He was secretary at that time?

A. He was.

Q. And Mr. Bretherton was assistant secretary?

A. Assistant secretary.

Q. And you were vice president at that time?

A. I was.

Q. And acted as such?

A. Yes sir.

Mr. FENTON: I offer such of these pages as I will identify and read.

Mr. KAVANAUGH: To what do they relate?

Mr. FENTON: They relate to the authorization of the leases to the Southern Pacific Company and they relate—I think they relate exclusively to the authorization to make the lease of——

A. July 1, 1887.

256 Mr. FENTON: Well, it does not begin that far back, Mr. Koehler. It is from September 19, 1887, down to and including November 13, 1893, and I have another book that precedes that.

Mr. KAVANAUGH: I object to the introduction as incompetent, irrelevant and immaterial.

Mr. FENTON: I think the leases would prove themselves, Your Honor, but I would prefer——

Mr. KAVANAUGH: I think they are the best evidence. And on the further ground that these are not the best evidence.

Mr. FENTON: I will offer the leases later.

Q. I show you what purports to be volume 3 record of minutes of the Oregon and California Railroad Company beginning with the record of January 10, 1887, down to and inclusive of September 12,

1887, all being pages 358 to 413, both inclusive, and ask you to look at those intermediate pages and see if you recognize that as the minute book of the Oregon and California Railroad Company for that time and if you recognize the signature of Bretherton as assistant secretary or of secretary and of Col. McCracken as president and of yourself where you have signed for the president or as vice president.

A. These are the minutes of the meetings and the records of the company during the period mentioned. I recognize the signatures of the officers second vice president and secretary.

Q. You recognize the signature of George H. Andrews as the second vice president and W. W. Bretherton as secretary during that time?

A. Yes.

Mr. FENTON: I withdraw that last offer of volume 3. It is covered by volume 4.

Mr. BENBOW: I would like to insert an objection to this offer.

Objection overruled. Exception taken.

257 Q. I now show you volume 2 of the record what purports to be volume 2 of the minutes of the Oregon and California Railroad Company beginning at page 58 and extending to the fifth line of page 79 and will ask you if you recognize those as the minutes of the Oregon and California Railroad Company held September 8, 1880, and up to and including February 2, 1881.

A. I do recognize this book as part of the records of the Oregon & California at the pages referred — as the proceedings at the period therein shown.

Q. You recognize the signature of the officers A. C. Cunningham—

A. A. G.

Q. A. G. Cunningham as secretary and R. Koehler as president during that time?

A. Yes.

Q. They were the respective officers they purport to be?

A. Yes sir.

Mr. FENTON: I offer these then. That is a portion of the acceptance of this deed your Honor, deed of October 6, 1880.

Court: Deed from the Oregon Central?

Mr. FENTON: Yes.

Mr. BENBOW: Same objection.

Objection overruled. Exception saved.

Mr. FENTON: And it may be considered read.

Minutes from Volume 4, O. & C. R. R. records marked Complainant's Exhibit "H."

Minutes from Volume 2, O. & C. R. R. records marked Complainant's Exhibit "I."

Mr. FENTON: I would like to withdraw Mr. Koehler for the present. Mr. Grutze, Deputy Auditor is here and I want to call him on one question.

COMPLAINANT'S EXHIBIT "I".

Oregon & California Railroad Company.

Called Stockholders' Meeting.

MAY 22ND, 2 p. m., 1879.

Pursuant to notice to each Stockholder, the meeting took place at 2 P. M.

The President, H. Villard, called the meeting to order, and directed the Secretary to call the roll of Stockholders, which was proceeded with, and the following Stockholders responded present:

C. H. Lewis.....	1 share
Paul Schulze.....	1 "
S. F. Chadwick.....	1 "
R. Koehler, Trustee.....	105,000 "
R. Koehler.....	1 "
H. Villard, Trustee.....	94,992 "
C. A. Dolph.....	1 "
H. Villard.....	1 "
J. N. Foster.....	1 "
J. N. Dolph.....	1 "
Total	200,000 "

The Secretary announced the result as showing all the capital stock present, represented by the holders thereof.

The President announced the meeting ready for the consideration of business to come before it. Mr. J. N. Dolph then read for the information of the meeting, the new code of By-Laws proposed to be adopted, and moved the adoption, seconded by Mr. Koehler and passed by a unanimous vote, the President announced the By-Laws adopted.

Mr. J. N. Dolph offered the following resolution.

259 Resolved, That the following supplementary Articles of Incorporation be and the same are hereby approved and adopted and that the Directors of this Company be and they are hereby directed to execute, acknowledge and file the same. Seconded by C. A. Dolph and unanimously adopted.

Supplementary Articles of Incorporation.

Know all men by these presents: That we, the undersigned, Henry Villard, Richard Koehler, J. N. Dolph, Paul Schulze and C. H. Lewis, being all the Directors of the Oregon & California Railroad Company, in pursuance of a resolution to that effect, of a special meeting of the Stockholders of said Oregon & California Railroad Company passed by unanimous vote of all the Stock of the Company on the 22nd day of May, A. D., 1879.

Do hereby, Adopt and file the following:

Supplementary Articles of Incorporation of the Oregon and California Railroad Company.

The Oregon and California Railroad Company hereby adopts the following Supplementary Articles of Incorporation in addition to the present Articles of Incorporation for the purpose of engaging in the new enterprise or business pursuits hereinafter specified in addition to the enterprise described in the original Articles and in the (inserted)

same manner as if there were issued at the end of the third of the original Articles the following provisions.

Second. To purchase or lease, or operate and maintain on such terms as may be agreed upon the Railroad and Telegraph Lines or any part thereof of the Oregon Central Railroad Company, 260 the Western Oregon Railroad Company, as the same are now constructed or may be hereafter respectively constructed and extended, and any and all other Railroads constructed, or to be hereafter constructed in Oregon, California or Nevada, and connecting or intended to connect with the Railroad of this Corporation, or any Railroad owned, leased, or operated, by this Company, or by any Company of the Stock of which this Company may own a controlling interest, with the rolling stock, equipment and appurtenances of any such Railroad, and to purchase or charter and manage and operate Steamships and steamboats for transportation of freight and passengers from and to points on the Railroad of this Company or other Railroad at any time owned or operated by it.

Third. To facilitate and assist the construction and equipment of the Railroad and Telegraph lines of the Oregon Central Railroad Company or Western Oregon Railroad Company, or any other Railroads in Oregon, California or Nevada, connecting or intended to connect with the Railroad of this Corporation, or with any Railroad leased, owned or operated by this corporation or with the Railroad of any Corporation in the stock of which this Company has a controlling interest, and for such purpose to subscribe for or purchase the stocks or bonds of any such Company, and also to purchase the stock or bonds of any steamship or steamboat Company formed for the operation of Steamships or Steamboats from or to points on the Railroad of this Corporation or other Railroads at any time owned or operated by it, to guarantee or secure the payment of any such bonds or the interest thereon by pledge or mortgage of the property of this Corporation, or any part thereof, or otherwise.

261 Fourth. To obtain from time to time from the Legislators of said states the necessary charters or other authorization for carrying out and facilitating the above objects, or any of them.

Fifth. To purchase or acquire lands or lots whether adjacent or contiguous to its railroad or not, and to lease, sell, mortgage or otherwise dispose of such lands in such manner as may be deemed fit.

Sixth. To borrow money on bonds, notes or otherwise, for the

general purpose of the corporation, and to mortgage its railroad or any railroads at any time owned by it, their branches, franchises, rolling stock, and any or all other property of such corporation to secure the payment thereof.

Seventh. To do all other things necessary or proper for the accomplishing any or all of the objects above specified.

In witness whereof, we have to these presents, executed in triplicate, set our hands and seals and the corporate seal of said company this 22nd day of May, A. D. 1879.

262 The following communication was then read to the meeting.

OFFICE OF THE OREGON AND CALIFORNIA RAILROAD CO.,
PORTLAND, May 22, 1879.

To the Stockholders of the Oregon and California Railroad Company:

The undersigned Directors of the Oregon and California Railroad Company here present for your consideration and action amended By-Laws for said Company and should the same be adopted by the Stockholders' meeting now commenced, we hereby resign as Directors of the Company to take effect upon the election and qualification of a new board of the number in such new by-laws provided.

(Signed)

HENRY VILLARD.
R. KOEHLER.
J. H. FOSTER.
C. H. LEWIS.
S. F. CHADWICK.
J. N. DOLPH.

Mr. Koehler then stated to the meeting that Mr. Thielsen having ceased to be a director by the transfer of his stock, and all the other members having resigned as directors of this Company as set forth in the communication just read to this meeting, he, therefore, moved that the resignation be accepted, and that the stockholders now proceed to elect a new board in accordance with the By-Laws just adopted by this meeting, (as they appear of record in the proceedings

263 of the Board of Directors, of the session to be held immediately after the adjournment of this meeting.

Mr. Chadwick seconded the motion, and on being put the vote was unanimously adopted.

The election was then proceeded with by ballot, and upon canvassing the vote, it was found that Henry Villard, Richard Koehler, C. H. Lewis, J. N. Dolph and Paul Schulze, had each received 200,000 votes being all the capital stock of the company, were declared unanimously elected and the President filed the following certificate of election:

STATE OF OREGON,

County of Multnomah, ss:

I, Henry Villard, President of the Oregon and California Railroad Company, hereby certify that at a meeting of the stockholders of said company held at its office in Portland, Oregon, on the 22nd day of May, 1879 at which all the stockholders of said company were present and voted in person or by proxy, the former board of Directors of said company having resigned to take effect upon the election and qualification of a new board, the following named persons were duly elected Directors for the ensuing year, and until their successors are elected and qualified, to-wit: H. Villard, R. Koehler, J. N. Dolph, C. H. Lewis and P. Schulze, and that on said election each of said persons received the votes of the entire capital stock of said company.

(Signed)

HENRY VILLARD,

*President of the Oregon & California Railroad
Company, and of the Stockholders' Meeting.*

264 The newly elected board of Directors thus qualified as such Directors by filing the following oath of office.

STATE OF OREGON,

County of Multnomah, ss:

We, Henry Villard, Richard Koehler, J. N. Dolph, C. H. Lewis and P. Schulze, being each severally and duly sworn, say and each for himself says, that he will faithfully and honestly discharge the duties of Director of the Oregon and California Railroad Company, a corporation duly incorporated under the laws of Oregon to the best of my ability so help me God.

(Signed)

HENRY VILLARD.

R. KOEHLER.

C. H. LEWIS.

J. N. DOLPH.

P. SCHULZE.

Sworn and subscribed to before me this 22nd day of May, A. D. 1879.

(Signed)

[SEAL.]

JNO. D. BILES,

Notary Public.

On motion of J. N. Dolph, seconded by C. H. Lewis, the meeting adjourned without day.

HENRY VILLARD, *President.*A. G. CUNNINGHAM, *Sec.*

265 *Directors' Meeting After Recess.*

The new board of Directors Messrs. H. Villard, R. Koehler, C. H. Lewis, J. N. Dolph and P. Schulze, being present and having filed their qualification- as Directors (which appears of record in stock-

holders' proceedings on page 21 of this journal), met in pursuance of recess taken by old board of Directors, for the stockholders' meeting.

The Secretary called the meeting to order and announced the first business before the meeting to be the election of a chairman to preside until a President was elected, and that nomination for chairman was then in order. Henry Villard was put in nomination for chairman and on the vote being taken was declared unanimously elected and took the chair, and announced nominations for President in order.

Mr. Dolph nominated Mr. Henry Villard for President and on the vote being taken Mr. Villard was declared unanimously elected and took the chair as President.

The President stated that the election of a Vice President was the next business, and that nomination for that office was in order.

Mr. Dolph nominated Richard Koehler for Vice President and on the vote being taken, Mr. Koehler was declared unanimously elected Vice President.

The appointment of Manager, Secretary and Treasurer being next in order, Mr. Dolph nominated Mr. R. Koehler for Manager, seconded by Mr. Lewis and unanimously adopted.

Mr. Koehler nominated A. G. Cunningham for Secretary and Treasurer seconded by Mr. Lewis, and unanimously adopted.

266 The board being now fully organized by the election and appointment of the following officers:

Henry Villard, President;

Richard Koehler, Vice President;

Richard Koehler, Manager;

A. G. Cunningham, Sec'y and Treasurer; the President called the board to order and announced the board ready for the transaction of business.

Mr. Dolph offered the following preamble and resolution, which was seconded by Mr. Lewis and unanimously adopted.

Whereas, At a meeting of the stockholders of this Company held at the office of the Company May 22nd, 1879, amended by-laws of this company were duly adopted by the unanimous vote of all the capital stock of this company, which are as follows, to-wit:

267 *By-Laws of the Oregon & California Railroad Company.*

I. The officers of the corporation shall be a President, Vice President, Manager, Secretary, Treasurer, and a Board of five Directors.

II. The President and Vice President shall be elected by the Directors at the first meeting of the Board after their election and qualification, from their own number, and they shall hold office until the next annual meeting of the stockholders and until their successors shall be elected and qualified.

III. At the same meeting the Directors shall also appoint a Manager, Secretary and Treasurer, who shall hold office during the pleasure of the Board.

IV. The President shall preside at all meetings of the Board of Directors and the stockholders; he shall act as Inspector of all elections of Directors and certify who are elected Directors; he shall sign all deeds and contracts on behalf of the Company, and all certificates of stock of the Company, and countersign all cheques drawn by the Treasurer upon the Company's bankers unless countersigned by the Manager; he shall, at each annual meeting of the stockholders, make a report to the stockholders of the state of the business of the Company; he shall have general charge of and supervision over all the business of the Company and over all its officers and employees; all appointments of subordinate employees by the Manager shall, unless expressly authorized by the Board, be subject to his approval, and he shall further perform all acts incident to
268 position of President or required by law.

V. The Vice President shall assist the President; shall preside at all meetings of the Board or of the stockholders at which the President is not present, and during the absence of the President from the state or his inability to act, shall possess the same powers and perform the same duties.

VI. The Manager shall be a civil engineer of experience in railroad business, and shall have the general charge of the maintenance and operation of the Company's railroad, under the supervision of the President and direction of the Board.

VII. The Manager shall appoint, subject to the ratification of the President, the following subordinate officers, namely: Superintendent, Accountant, General Passenger and Ticket Agent, General Freight Agent, Land Commissioner, and Counsel, and engage such clerks and mechanics and other workmen as may be necessary.

VIII. The Manager shall purchase all supplies and materials for the use of the Company, but only with the approval of the President or Board of Directors and subject to the provisions of Article XXXVI of these By-Laws as to contracts to be made on behalf of the Company.

IX. The salaries of the President, Vice-President, Manager, Secretary and Treasurer shall be fixed by the Board of Directors; those of all subordinate officers shall be fixed by the Manager, subject to the ratification of the President and the approval of the
269 Board.

X. The Secretary shall keep a fair and correct record of the proceedings of all meetings of the Board and of the stockholders and all other official business of the Company; he shall attend to the giving and serving of all notices to the Directors or stockholders or otherwise required by law; he shall have the custody of the corporate seal, and it shall be his duty to affix the same to all deeds, contracts, or other documents to be executed by the Company, and to attest such deeds, contracts, and other documents, but he shall not affix the seal of the Company to any instrument (except stock certificates) unless thereunto previously authorized by resolution of the Board or a general meeting of the stockholders; he shall have charge of the stock-book and stock certificate-book and of the trans-

fer-book, registration of transfers and issue of new stock certificates he shall attend to the general correspondence of the Company, and perform such other duties as are incident to the office of Secretary or may be assigned to him by the Board.

XI. The Treasurer shall have charge of all the moneys, securities for money, and other assets of the Company, but shall deposit so much of the moneys coming to his hands as is not required for the immediate current purposes of the Company, with a bank or bankers designated by the Board and in the name of the Company; he shall keep a correct and full account of all moneys received and disbursed by him, or on his account, or by his order, and of all securities or other assets received or delivered by him; he shall render a statement of his cash account at each regular meeting of the
270 Board, and shall perform such other duties incident to the duties of Treasurer as the Board may from time to time direct. The Board may, from time to time, fix the amount of cash to be kept in hand by him.

XII. No payments shall be made, or securities or other assets delivered over, except upon the written order or draft of the President or Manager, and all cheques upon the Company's bankers shall be signed by the Treasurer, but must be countersigned either by the President or Manager—but the salaries and wages of officers and employees may be paid by the Treasurer on a general pay roll signed by the President or Manager without further order for the separate amounts.

XIII. The Treasurer shall give a bond with sufficient surety, either personal or collateral, approved by the Board, and in a sum to be fixed by the Board, for the faithful performance of his duties, and for the delivery to his successor in office of all the moneys, securities or assets of the Company in his possession or under his control.

XIV. The Board of Directors shall hold a regular monthly meeting on the second Wednesday of each month at eleven o'clock A. M.—the Manager shall attend every such meeting and shall submit to the Board a statement of the earnings and expenses of the railroad during the previous month and a report of all new appointments of officers and employees, and furnish such other information as the Board may from time to time direct, and at all such meetings the Treasurer's report of the moneys and assets of the
Company shall be laid before the Board.

271 XV. A majority of the Board of Directors shall form a quorum for the transaction of business at any regular or special meeting of the Board. The Board shall themselves determine the order of disposition of business coming before them. Vacancies occurring in the Board by death, resignation, disqualification, or incapacity to act, shall be filled by the remaining Directors, and the Director so elected shall hold office until the next annual meeting and until his successor is elected and qualified. The surviving or continuing Directors may act notwithstanding any vacancy in the Board.

XVI. A special meeting of the Board shall be called by the Secretary, whenever he is required to do so by the President or two Directors, by giving notice in writing either personally to each Director, or by leaving such notice at his residence or place of business, but no notice need be given to any Director absent from the State.

XVII. The annual meeting of the stockholders of the Company shall be held on the second Tuesday in April of each year, at eleven o'clock A. M., at which the Board of Directors shall be elected and the annual report of the President submitted. The Directors chosen shall hold their office for one year thereafter and until their successors are elected and qualified.

XVIII. At all stockholders' meetings, the vote in person or by proxy of a majority in amount of all the stock of the company shall be necessary for any election or for the passage of any resolution except one for the adjournment of any meeting to some other date. No notice shall be necessary for the holding of any
272 adjourned meeting.

XIX. At all meetings of stockholders, each stockholder shall be entitled to one vote for each share of stock held by him, but no person shall vote on any share of stock upon which any assessment or any portion thereof is due and unpaid.

XX. Any stockholder may vote by proxy, but such proxy shall be appointed by writing subscribed by such stockholder and filed with the Secretary at or before the time the vote is tendered. Such proxy may either be for such particular meeting or for all meetings until revoked, and unless the contrary is stated therein, the appointment of a proxy shall entitle the proxy to vote at all meetings thereafter at which the stockholder is not present, and until such proxy is cancelled or revoked by writing subscribed by the stockholder and filed with the Secretary.

XXI. The Secretary shall prepare for and submit to every stockholders' meeting a certified list of all the stockholders of the Company and of those entitled to vote at such meeting, and such list shall be prima facie evidence of the right to vote; and shall also produce the stock book whenever required by any stockholder so to do.

XXII. Voting at all stockholders' meetings shall be by ballot. The President shall be inspector of all elections of Directors and certify who are elected, and shall also act as inspector of the voting on any other matter or resolution, unless the meeting shall appoint
special inspectors for such purpose.

273 XXIII. No person is eligible to the office of Director unless he is a stockholder, and if he ceases to be such stockholder, he ceases to be a Director. Three of the Directors shall be residents of the State, and if when there are already two non-resident Directors, any other Director shall cease to be a resident, he ceases to be a Director. Before entering on the discharge of his duty, each Director shall qualify by filing with the Secretary a written oath to faithfully and honestly discharge his duties.

XXIV. Any Director may hold any other office together with that of Director, and any two officers may be held by the same person except those of President, Vice President, and Secretary. Each Director shall be paid ten dollars for each meeting of the Board at which he shall attend.

XXV. A special meeting of the stockholders shall be called by the Secretary when so required, either by the Board of Directors or by the holders of one-third of all the stock. Notice of such meeting shall be delivered to or mailed to the address of every stockholder, so as to be received at least ten days previous to the day of such meeting, stating the time of such meeting and the object thereof. If the Secretary shall neglect to convene such meeting for one week after notice in writing so to do has been served upon him, any Director or stockholder may himself do so.

XXVI. At any special meeting of the stockholders, any or
274 all of the Directors or officers may be removed and others elected in their place, but only by the vote of two-thirds in amount of all the stockholders in the Company, and that whether the meeting shall have been called for such purpose or not.

XXVII. The shares in the capital of the Company shall be represented by stock certificates signed by the President and attested by the Secretary, under the corporate seal of the Company. All certificates shall be bound in a book and shall be issued in consecutive order therefrom, and shall be numbered and registered in the order in which they are issued, and on the stub of each certificate issued shall be entered the name of the person owning the shares therein represented, with the number of shares and the date thereof; and the person receiving this certificate shall sign on such stub a receipt for the certificate issued to him. All certificates exchanged or returned to the Company shall be cancelled by the Secretary and such cancelled certificates pasted in their original place in the stock certificate book, and no new certificate shall be issued until the old certificate has been thus cancelled and returned to its original place in such book.

XXVIII. If any certificate be accidentally lost or destroyed, the Board may, upon proof of such loss and destruction and the giving of a proper bond of indemnity to their satisfaction by the stockholder, authorize the issue of a new certificate as a duplicate, bearing the same number.

XXIX. The Treasurer shall receipt, if required, upon the
275 stock certificate for all assessments paid thereon, and any stockholder whose stock is fully paid shall be entitled to a stock certificate, which shall state that such stock is fully paid and not subject to assessment.

XXX. Transfer of stock shall be made only upon the books of the Company by the holder in person, or by power of attorney duly executed and filed with the Secretary of the Company, and on the surrender of the certificate or certificates of such shares. Every stockholder and transferee shall furnish the Secretary with an address at which notices of meetings, assessments or other matters may

be served upon or mailed to him, and in default shall not be entitled to service of any such notice.

XXXI. The stock-book of the Company shall be kept by the Secretary in such a manner as to show intelligibly the original stockholders, their respective shares, the amounts paid and the amounts due thereon and all transfers thereof.

XXXII. The stock-book, stock certificate-book, as well as all other books of the corporation, shall be subject to the inspection, at all reasonable hours of any stockholder.

XXXIII. The Secretary shall also keep a transfer-book, in which he shall register all transfers of stock and the names and addresses of the transferees. Such transfer-book shall be closed for ten days previous to and on the day of the annual meeting of the stockholders.

276 XXXIV. The Board may make such assessments as they may think proper upon the unpaid stock of the Company, but no such assessments shall be payable until thirty days' notice of the time and place for payment thereof shall have been given to or left at the place of business or residence of the stockholder or mailed to his address. In case such assessment shall not be paid, the Board may cause the stock of the delinquent stockholder to be sold or suit to be brought for the amount thereof, but no such sale shall be made except by public auction at the office of the corporation after thirty days' notice of the time and place of sale has been published in a newspaper of general circulation in Portland, and the proceeds of such sale above the amount due, and after deducting the expenses, shall be paid to the delinquent stockholder. In case such sale shall not produce enough to satisfy the assessment, the delinquent stockholder shall continue personally liable to the Company for the balance, and the Directors shall cause suit to be brought therefor.

XXXV. Dividends may be declared by the Directors when and in such amounts as the Board may decide, but only out of net profits on hand and payable in cash and not in scrip or stock.

XXXVI. No deed, instrument, or contract of any description purporting to be made on behalf of the Company, except in relation to the ordinary routine of business of the railroad shall be valid, unless authorized by the Board of Directors, and no instrument shall be deemed to have been duly executed on behalf of the Company unless it shall be sealed with the corporate seal, signed by the President and attested by the Secretary.

277 XXXVII. These By-Laws shall be altered or amended only by the vote of a majority in amount of all the stockholders, at any annual meeting of the stockholders, or special meeting of the stockholders called for the purpose.

I certify that the above By-Laws were duly adopted at a special meeting of the stockholders of the Oregon & California Railroad Company, called for that purpose, and held on the 22nd day of May, A. D. 1879, by the unanimous vote of the stockholders of the Company.

Witness my hand and the corporate seal of the company this 26th day of May, A. D. 1879.

A. G. CUNNINGHAM,
Sec'y of the Oregon & California Railroad Company.

Resolved, That said By-Laws be and they are hereby approved and adopted by this Board as the By-Laws of this Company.

No further business presented for the action of the Board.

On motion of Mr. Dolph seconded by Mr. Schulze, the Board adjourned without day.

HENRY VILLARD, *President.*

A. G. CUNNINGHAM, *Sec'y.*

278 Office of the Oregon & California Railroad Company.

PORTLAND, OREGON, WEDNESDAY, 8th Sept., 1880.

Pursuant to notice to each Director, and in accordance with the By-Laws, the Directors met this day at 10:30 o'clock A. M.

Members present:

C. A. Dolph, J. N. Dolph, R. Koehler, C. H. Lewis, 4.

Absent:

Paul Schulze, 1.

Mr. R. Koehler, President, called the meeting to order and stated that the business for consideration of the Board would be fully understood from a resolution which Mr. J. N. Dolph would read to the Board.

Mr. J. N. Dolph then read the following:

Resolved, That this Company propose to the Oregon Central Railroad Company of Portland, Oregon, to purchase all the property of said Oregon Central Railroad Company of every name and nature, real, personal and mixed, and as a consideration therefor to pay off and satisfy the bonded debt of said Company, the debt of said Company to this Company and its floating indebtedness in amount as follows, to-wit: Amount due on the promissory notes of said Company now outstanding and unpaid one executed Feb'y 9th, 1872, to Ben Holladay, President for \$500,000, with interest at ten (10) per cent per annum, and one note for \$500,000 executed by said Company Aug. 29th, 1872, to Ben Holladay, President, drawing ten (10) per cent interest; and for the payment of which all the first mortgage Bonds of said Company are pledged, the interest being computed at five per cent only, from and after the execution of the agreement of April 6th, 1876, between Milton S. Latham, Agent and Henry Villard, Agent.

Amount due upon the Second Mortgage Bonds of said
279 Company, Principal \$300,000 with interest.

This Company, however, reserving the right to pay and satisfy the interest and principal of any of said Second Mortgage Bonds only at maturity, and should said Bonds or secured indebted

ness by any different computation of interest be found to be greater than above estimated, this Company to assume, pay and satisfy the same nevertheless, and should the same be found to be less, in amount, this Company not to be required to pay any greater sum for said property.

Amount due in account with Oregon & California Railroad Company \$120,472.02.

Amount due in account of construction and improvements \$13,006.52.

Resolved, That the President of this Company be and he is hereby authorized and directed to make in the name of and on behalf of this Company, the said Oregon Central Railroad Company a proposition for the purchase of all the property of said Oregon Central Railroad Company, real, personal and mixed, and to pay therefor the indebtedness of said Oregon Central Railroad Company as aforesaid.

After the reading Mr. C. A. Dolph moved the adoption of the resolution as read, which was seconded by J. N. Dolph, and declared unanimously adopted.

No further business being before the Board on motion of J. N. Dolph, second- by C. A. Dolph, the President declared the Board adjourned without day.

R. KOEHLER, *President.*

A. G. CUNNINGHAM, *Secretary.*

280 Office of the Oregon & California Railroad Company.

PORTLAND, OREGON, *April 10th, 1883.*

In pursuance of Article XVII of the By-Laws and notice published daily in the daily Oregonian from March 10th to April 10th in words and figures as follows:

Notice of Annual Stockholders' Meeting.

To the Stockholders of the Oregon & California Railroad Company:

You are hereby notified that the annual meeting of the Stockholders of the Oregon & California Railroad Company will be held at the office of the Company at the City of Portland, County of Multnomah, and State of Oregon, on Tuesday, the 10th day of April, 1883, at 11 o'clock A. M., of said day, for the purpose of electing Directors of said Company, to serve for the ensuing year, and transacting such other business as may come before the meeting.

And you are further notified that in pursuance of a resolution duly passed at a meeting of the board of directors of said Company, held at the office of the Company, March 5, 1883, the following resolution authorizing the filing of supplementary articles of incorporation of said Company, will be submitted to said annual stockholders' meeting for consideration and adoption, viz:

Resolved, That the Directors of this Corporation be, and they are hereby instructed and directed to file as soon as the same can be reasonably prepared and executed, supplementary articles of incorpo-

ration, amending Article III of the present Articles of this Company, as amended by the Supplementary Articles heretofore filed, by inserting after the seventh subdivision of said Article III, substantially the following subdivisions:

281 Eighth. With the consent of the holders of an absolute majority in amount of the preferred stock of the Company, at the time actually issued and outstanding, to sell and dispose of its railroad and property, or any part thereof, to lease, devise and let to any other Company or corporation incorporated under the laws of Oregon, authorized to operate railroads and transact business in the State of Oregon, all and singular its railroad and telegraph line then constructed, or to be constructed, or any portion thereof, with said tracks, depots, warehouses, stockyards, locomotives; cars, and other rolling stock, machinery and fixtures and appurtenances, ferries and ferry boats, and all lands, easements, rights of way, and property used in connection therewith; to enter into any operating or traffic contract, or any contract in the nature of a lease, with any such other Company or Corporation, transferring to such Company or Corporation the management and operation of its roads or any part thereof; to consolidate with any other corporation; to lease and operate the railroad or railroads of any corporation; to guarantee the payment of and assume the liabilities of any other corporation for bonds, coupons, dividends, or otherwise; to file supplementary articles of incorporation authorizing the corporation to engage in new enterprises; to increase its preferred or common capital stock or both; and to construct and equip a railroad and telegraph line with all necessary branches, from a point at or near Forest Grove, in Washington County, Oregon, to Astoria in Clatsop County, Oregon, to connect with its existing railroad, and to operate and maintain the same and carry freight and passengers thereon, and receive tolls therefor.

282 Ninth. To construct and equip a railroad and telegraph line, with all necessary branches, from the City of Portland in Multnomah County, Oregon, via Hillsboro and McMinnville to Corvallis, in Benton County, Oregon, and a railroad and telegraph line, with all necessary branches, from Corvallis, in Benton County, Oregon, to Junction City, in Lane County, Oregon, and to maintain and operate the same, and transport freight and passengers thereon, and to receive tolls therefor.

Tenth. To construct, operate and maintain a railroad bridge, or railroad and wagon road bridge, or both, across the Willamette River between the cities of Portland and East Portland, or above or below said cities, to connect its present railroads, and to collect and receive tolls for the passage of railroad trains and cars, goods, wares and merchandise, teams, wagons and other vehicles, live stock and foot passengers over the same.

GEO. H. ANDREWS,
Sec'y O. & C. R. R. Co.

PORTLAND, OR., March 10, 1883.

The Stockholders met at the office of the Company, Portland, Oregon, this day at 11 o'clock A. M.

The President being absent from the State the Vice President, Mr. R. Koehler, took the chair and called the meeting to order.

The Secretary submitted a certified list of the Stockholders of the Company entitled to vote, as follows:

Names of stockholders.	Shares of preferred stock.	Shares of common stock.
Andrews, Geo. H.....		2
Adams, Edward D.....		1
Baker, Lawrence James.....	120	60
283 H. R. Baltzer.....		1
Bretherton, Chas. E.....	560	
Bretherton, Chas. E., Trustee.....	36,340	22,575
Buchan, Patrick.....	1,190	
Cannon, John.....	50	
Curtis, Benjamin.....	80	
Curme, Decinues.....	30	
Davis, James.....	100	
Dolph, J. N.....		8
Hass & Sons.....	3,130	1,500
Hopkinson, George Henry.....	500	
Hopkinson, Amelius Arthur.....	500	
Hatcher, Daniel.....	10	
Koehler, Richard.....		1
Knoblanch, Chas. E.....		1
Lafthouse, James.....	250	
Mary Caroline, Marchioness of Drogeda..		10
Mackintosh, William.....	50	
Muir, John.....		1
Parker, Edward.....	10	
Peebles, R. D., Trustee.....	36,790	22,425
Peebles, R. D.....	350	210
Petyt, Robert.....	620	
Prescott, C. H.....		1
Ricords, Henry George.....	80	
Robertson & Charles.....	2,660	180
Sturdy, William.....	130	60
Schulze, Paul.....		1
Starbuch, W. H.....		1
Thielsen, H.....		1
284 Villard, Henry, Trustee.....	36,150	22,556
West, Francis Holksworth.....	10	
Yates, Robert.....	40	
Yates, Francis.....	100	
Warrant Account, L. & San. Fran. Bank.	150	400
Corbett, H. W.....		1
R. P. Earhart.....		1

McCracken, John	1
Morgan, A. H.	1
Macleay, Donald	1
	<hr/>
	120,000 70,000

On the roll being called the following Stockholders were present, in person or by proxy:

Name- of stockholders.	Shares of preferred stock.	Shares of common stock.
Andrews, Geo. H.		2
Baker, James Lawrence by Wm. Macintosh, proxy	120	60
Bretherton, Chas. E. by Geo. H. Andrews & Wm. Mackintosh, proxies.....	560	
Bretherton, Chas. E., Trustee, by Geo. H. Andrews & Wm. Mackintosh, proxies..	36,340	22,575
Davis, James by Wm. Mackintosh, proxy.	100	
Buchan, Patrick by Wm. Mackintosh, proxy	1,190	
Dolph, J. N.		8
Hass & Sons by Wm. Mackintosh, proxy.	3,130	1,500
Hopkinson, Geo. Henry by Wm. Mackintosh, proxy	500	
Hopkinson, Amelius Arthur by Wm. Mackintosh, proxy.....	500	
Hatcher, Daniel by Wm. Mackintosh, proxy	10	
Koehler, Richard		1
285 Mackintosh, Wm.	50	
Muir, John		1
Peebles, R. D., Trustee by Wm. Mackintosh, proxy	36,790	22,425
Peebles, R. D. by Wm. Mackintosh, proxy	350	210
Prescott, C. H.		1
Robertson & Charles by Wm. Mackintosh, proxy	2,660	180
Schulze, Paul by R. Koehler, proxy.....		1
Thielson, H.		1
Villard, Henry, Trustee, by J. N. Dolph, proxy	36,150	22,556
	<hr/>	<hr/>
	118,450	69,521

The minutes of the last annual and adjourned meeting of the Stockholders were read and on motion of Mr. J. N. Dolph, seconded by Mr. H. Thielson, were approved as read.

On motion of Mr. J. N. Dolph, seconded by Mr. John Muir, it was resolved that the meeting proceed to the election of eleven Directors for the ensuing year.

The Chairman appointed Mr. Muir, Teller. The vote was by open ballot and as follows:

Geo. H. Hopkinson.....	187,971	votes
Patrick Buchan	187,971	votes
R. D. Peebles	187,971	votes
Henry Villard	128,496	votes
Herman R. Baltzer.....	128,496	votes
H. W. Corbett.....	128,496	votes
R. P. Earhart.....	128,496	votes
286 John McCracken.....	128,496	votes
A. H. Morgan.....	128,496	votes
Wm. Mackintosh.....	128,496	votes
Donald Macleay	128,496	votes

The Chairman declared the above named Stockholders duly elected Directors for the ensuing year and filed the following certificate of their election:

STATE OF OREGON,
County of Multnomah, ss:

I, Richard Koehler, Vice President and Acting President of the Oregon & California Railroad Company and Chairman of the Annual Stockholders' Meeting of said Company, do hereby certify that at said annual meeting, duly called and held at the office of said Company in the City of Portland, in the State of Oregon, and on the tenth day of April, A. D., 1883, the following named persons were duly elected Directors of said Company, to serve for the ensuing year and until their successors are duly elected and qualified, to-wit: R. D. Peebles, Geo. H. Hopkinson, Patrick Buchan, Henry Villard, H. R. Baltzer, Donald Macleay, Wm. Mackintosh, J. McCracken, R. P. Earhart, A. H. Morgan and H. W. Corbett.

(Signed)

R. KOEHLER,
Vice President and Chairman of Stockholders' Meeting.

April 10th, 1883.

Mr. J. N. Dolph presented the following resolution and moved its adoption, viz,—

Resolved, That the Directors of this corporation be and they are hereby instructed and directed to file as soon as they can be reasonably prepared and executed, Supplementary Articles of
287 Incorporation amending Article III of the present Articles of the Company as amended by the Supplementary Article heretofore filed, by inserting after the seventh sub-division of said Article III the following subdivisions:

Eighth. With the consent of the holders of an absolute majority in amount of the preferred stock of the Company, at the time actually issued and outstanding to sell and dispose of its railroad and property or any part thereof, to lease, demise and let to any other Company or corporation incorporated under the laws of Oregon or au-

thorized to operate Railroads and transact business in the State of Oregon, all and singular its railroad and telegraph line then constructed or to be constructed or any portion thereof with side tracks, depots, warehouses, stock yards, locomotives, cars and other rolling stock, machinery and fixtures and appurtenances, ferries and ferry boats and all lands, easements, rights of way and property used in connection therewith, to enter into any operating or traffic contract in the nature of a lease with any such other Company or corporation transferring to such Company or corporation the management and operation of its roads or any part thereof, to consolidate with any other corporation to lease and operate the railroad or railroads of any corporation, to guarantee the payment of and assume the liabilities of any other corporation for bonds, coupons, dividends or otherwise, to file supplementary articles of incorporation authorizing the corporation to engage in new enterprises, to increase its preferred or common capital stock or both, and to construct and equip a railroad and telegraph line with all necessary branches from a point at 288 or near Forest Grove, in Washington County, Oregon, to Astoria, in Clatsop County, Oregon, to connect with its existing railroad and to operate and maintain the same and carry freight and passengers thereon and receive tolls for the same.

Ninth. To construct and equip a railroad and telegraph line with all necessary branches from the City of Portland, in Multnomah County, Oregon, via Hillsboro and McMinnville to Corvallis, in Benton County, Oregon, and a railroad and telegraph line with all necessary branches from Corvallis, in Benton County, Oregon, to Junction City, in Lane County, Oregon, and to maintain and operate the same and transport freight and passengers thereon and to receive tolls therefor.

Tenth. To construct, operate and maintain a railroad bridge or railroad and wagon road bridge or both, across the Willamette River between the Cities of Portland and East Portland, or above or below said Cities, to connect its present railroads and to collect and receive tolls for the passage of railroad trains and cars, goods, wares and merchandise, teams, wagons and other vehicles, live stock and foot passengers over the same.

Seconded by Mr. Paul Schulze.

The Chairman submitted the resolution to the meeting and a vote was taken by roll call as follows:

For the adoption of the resolution:

	Shares of preferred stock.	Shares of common stock.
Andrews, Geo. H.....		2
Baker, James Lawrence by Wm. Mackintosh, proxy	120	60
Bretherton, Chas. E. by Geo. H. Andrews & Wm. Mackintosh, proxies....	560	
289 Bretherton, Chas. E., Trustee, by Geo. H. Andrews and Wm. Mackintosh, proxies	36,340	22,575
Davies, James, by Wm. Mackintosh, proxy	100	

Buchan, Patrick, by Wm. Mackintosh, proxy	1,190	
Dolph, J. N.....		8
Hass & Sons by Wm. Mackintosh, proxy.	3,130	1,500
Hopkinson, Geo. H., by Wm. Mackintosh, proxy	500	
Hopkinson, Amelius Arthur by Wm. Mackintosh, proxy	500	
Hatcher, Daniel, by Wm. Mackintosh, proxy	10	
Koehler, Richard		1
Mackintosh, Wm.	50	
Muir, John		1
Peebles, R. D., Trustee, by Wm. Mackintosh, proxy	36,790	22,425
Peebles, R. D. by Wm. Mackintosh, proxy	350	210
Prescott, C. H.....		1
Robertson & Charles by Wm. Mackintosh, proxy	2,660	180
Schulze, Paul, by R. Koehler, proxy....		1
Thielson, H.		1
Villard, Henry, Trustee, by J. N. Dolph, proxy	36,150	22,556
	<hr/> 118,450	<hr/> 69,521

The resolution having received the vote of all the stock present, which, being more than three fourths of the capital stock of this company, and more than an absolute majority in amount of the preferred Stock of this Company at the time actually issued and outstanding, the Chairman declared the resolution unanimously adopted.

290 Office of the Oregon & California Railroad Company.

PORTLAND. OREGON, *April 18th, 1883.*

A special meeting of the Board of Directors was held at the office of the company, Portland, Oregon, this day at 11 o'clock, A. M., present:

President H. Villard.

Directors R. Koehler, J. N. Dolph, C. H. Prescott, John Muir, Paul Schulze, and H. Thielson.

Secretary Geo. H. Andrews.

The president presented to the meeting a copy of the record of the proceedings of the annual meeting of the Stockholders of this Company, held at the office of the Company, Portland, Oregon, on the 10th day of April, 1883, which was read and discussed by the Board, whereupon, upon motion of Mr. J. N. Dolph, seconded by Mr. C. H. Prescott, the following resolutions were unanimously adopted, to-wit:

Whereas: At the Annual Meeting of the Stockholders of this Com-

pany duly called and held at the office of this Company in Portland, Oregon, at the hour of 11 o'clock A. M., on the 10th day of April, 1883, the following resolutions were duly passed by the vote of more than three fourths of all the capital stock of this Company and of more than a majority in amount of the preferred stock of this Company, to-wit:

Resolved: That the Directors of this Corporation be and they are hereby instructed and directed to file as soon as they can be reasonably prepared and executed Supplementary Articles of Incorporation amending Article III of the present Articles of the Company as amended by the Supplementary Article heretofore filed by
291 inserting after the seventh sub-division of said Article III the following sub-divisions:

Eighth. With the consent of the holders of an absolute majority in amount of the preferred stock of the Company at the time actually issued and outstanding to sell and dispose of its Railroad and property or any part thereof, to lease, demise, and let to any other Company or corporation incorporated under the laws of Oregon, or authorized to operate railroads and transact business in the State of Oregon, all and singular its railroad and telegraph lines then constructed or to be constructed, or any portion thereof with side tracks, depots, warehouses, stockyards, locomotives, cars and other rolling stock, machinery and fixtures and appurtenances, ferries and ferry boats and all lands, easements, rights-of-way and property used in connection therewith, to enter into any operating or traffic contract in the nature of a lease with any such other Company or corporation, transferring to such company or corporation the management and operation of its roads or any part thereof, to consolidate with any other corporation, to lease and operate the railroad or railroads of any corporation, to guarantee the payment of and assume the liabilities of any other corporation for bonds, coupons, dividends or otherwise, to file supplementary articles of incorporation, authorizing the corporation to engage in new enterprises, to increase its preferred or common capital stock or both, and to construct and equip a railroad and telegraph line with all necessary branches from a point at or near
Forest Grove, in Washington County, Oregon, to Astoria,
292 in Clatsop County, Oregon, to connect with its existing railroad and to operate and maintain the same and carry freight and passengers thereon and receive tolls for the same.

Ninth. To construct and equip a railroad and telegraph line with all necessary branches from the City of Portland, in Multnomah County, Oregon, via Hillsboro and McMinnville, to Corvallis, in Benton County, Oregon, and a railroad and telegraph line, with all necessary branches from Corvallis in Benton County, Oregon, to Junction City, in Lane County, Oregon, and to maintain and operate the same and transport freight and passengers thereon and to receive tolls therefor.

Tenth. To construct, operate and maintain a railroad bridge, or railroad and wagon road bridge, or both, across the Willamette River, between the cities of Portland and East Portland, or above

or below said Cities, to connect its present railroads and to collect and receive tolls for the passage of railroad trains and cars, goods, wares and merchandise, teams, wagons and other vehicles, live stock and foot passengers over the same.

Resolved, First, That the Directors of this Company be and they are hereby authorized and directed to proceed to execute and file supplementary articles of incorporation of this Company as in said resolution of said Stockholders' meeting of this Company authorized and provided.

Resolved, That notice of the filing of said supplementary Articles of Incorporation be given by publication in the Daily Oregonian, a newspaper of general circulation printed and published daily, Sundays excepted, in the City of Portland, for ten successive days.

1880.

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COMPLAINANT'S EXHIBIT "H."

Office of the Oregon and California Railroad Company.

PORTLAND, OREGON, *December 26th, 1887.*

Pursuant to Article XIV of the By-Laws the Board of Directors met at the office of the Company this day at 11 o'clock A. M. Present: 2d Vice President and Director R. Koehler, and Directors D. Macleay, J. McCracken, R. P. Earhart, W. W. Bretherton and Geo. H. Andrews.

The Secretary and Assistant Secretary both being absent, Mr. Geo. H. Andrews, on motion of Mr. J. McCracken, seconded by Mr. R. P. Earhart, was appointed Secretary pro tem.

The minutes of the last regular meeting were read and approved.

The Second Vice President stated to the Board that he had applied for a modification of the order of the United States Circuit Court of January 19th, 1885, enjoining the Directors from interfering and encumbering the property of the Company, and that said court had issued an order permitting action by this Board upon the question of a new mortgage and the lease of the Company's property to the Southern Pacific Company, and presented to the Board a certified copy of said order.

Whereupon, on motion of Mr. J. McCracken seconded by Mr. R. P. Earhart, it was resolved that said order be spread upon the records of this meeting, and is in words and figures as follows, to-wit:

294 In the Circuit Court of the United States for the District of Oregon.

No. 1109.

LAWRENCE HARRISON et al., Complainants,

VS.

THE OREGON AND CALIFORNIA RAILROAD COMPANY et al., Defendants.

DECEMBER 20TH, A. D. 1887.

Upon reading and filing the petition of the Oregon and California Railroad Company, praying for an order to modify the injunction granted in this case on January nineteenth, eighteen hundred and eighty-five, so far as to permit said Oregon and California Railroad Company to issue certain new bonds, and to execute a mortgage upon its railroad and other property to secure the same, and to lease its railroad and other property to the Southern Pacific Company, a corporation organized under the laws of Kentucky; and after hearing Mr. Edwin H. Peery, of counsel for said petitioner; and it duly appearing from said petition that an agreement has been made by and between George Henry Hopkinson, Robert Davie Peebles, Patrick Buchan and Charles Edward Bretherton, the reconstruction committee of the Oregon and California Railroad Company, of the first part, the Pacific Improvement Company, a corporation created, organized and existing under the laws of the State of California, of the second part, Lawrence Harrison, Andrew Haes, Henry Hopkinson, George Henry Kearton and Lawrence James Baker, a committee sitting in London, England, and representing the British holders of the first mortgage bonds of said Oregon and California Railroad Company, of the third part, Heinrich Hohenemser, Hermann Koehler, Karl Pollitz, Adolph Otto,

295 Philip Bonn, Heinrich Oswalt, Siegmund Lion and Emil Kalb, a committee sitting in Frankfort, Germany, and representing the German holders of the first mortgage bonds of said Company, of the fourth part, the Southern Pacific Company, a corporation created, organized and existing under and by virtue of the laws of the State of Kentucky, of the fifth part, the said Oregon and California Railroad Company, of the sixth part, and the Union Trust Company, a corporation created, organized and existing under and by virtue of the laws of the State of New York, of the seventh part, and which agreement, among other provisions, in Article third thereof provides as follows: "Third. The bondholders' committees have agreed to sell to and exchange with the Southern Pacific Company, upon the terms hereinafter stated, and upon compliance with the same by the Southern Pacific Company and the Oregon and California Railroad Company, or its successors, first mortgage bonds of said Oregon and California Railroad Company (out of the total amount outstanding of eight million, six hundred and six thousand dollars (\$8,606,000) par value) issued under and secured by mort-

gage of said Company to Henry Villard, Horace White and Charles Edward Bretherton as trustees, dated June first, one thousand eight hundred and eighty-one, but of which the Farmers' Loan and Trust Company of New York, is now sole trustee, to the amount, at their par value, of eight million, four hundred thousand dollars (\$8,400,000) bearing all unpaid coupons appertaining thereto. For that purpose they are to deposit the said eight million, four hundred thousand dollars (\$8,400,000) of bonds, within forty days after the execution of this agreement, with the Union Trust Company of

296 New York. The Southern Pacific Company, in consideration thereof and in payment and exchange therefor, is to deliver to said Trust Company, to be delivered by it to the bondholders' committees, or their nominees, in the City of New York, nine million two hundred and forty thousand dollars (\$9,240,000) par value of new bonds of the Oregon and California Railroad Company, or its successors, (being at the rate of one hundred and ten (110) per cent. new bonds upon the amount of old bonds, exchanged as aforesaid), carrying interest at the rate of five (5) per centum per annum from the first day of July, one thousand eight hundred and eighty six, (except so far as such interest may have been heretofore paid in cash, as hereafter provided), and guaranteed both principal and interest, by the Southern Pacific Company, and secured as hereinafter stated; and also to pay the sum in cash of four pounds Sterling for each now existing bond of one thousand dollars, received in exchange as aforesaid; such new bonds so to be delivered by the Southern Pacific Company in payment and exchange as aforesaid, shall be payable, principal and interest, in gold, forty years after date, and bear interest at the rate of five per centum per annum, payable half yearly, and shall be guaranteed, both as to principal and interest, by the Southern Pacific Company, and shall be secured by a mortgage to be made by the said Railroad Company, or its successors, to the Union Trust Company of New York, (or such other company as shall be agreed upon by the parties), upon all the property, which at the time of such deposit of existing bonds, shall be covered by the mortgage securing such first mortgage bonds of the Oregon and California Railroad Company, except the amounts due for lands sold previous to the date of such deposit, and
 297 except the cash in the hands of the mortgage trustee, and upon all extensions thereof and future acquired property in Oregon, of the Company making such new bonds. The net proceeds of lands sold subsequent to the date of such deposit, and of the lands in such mortgage securing such new bonds, shall be applicable to the redemption and cancellation of the new bonds, by annual drawings at par, unless purchasable at a lower price, as prescribed in the mortgage. Such new mortgage is to be equivalent, in point of lien and priority, to the aforesaid existing mortgage securing the said first mortgage bonds, except as to such of the latter as are not now or hereafter may not be deposited by the London and Frankfort bondholders' committees under this agreement. The amount of bonds to be issued under such new mortgage shall be as follows: Thirty thousand dollars (\$30,000) per mile for every mile

of standard gauge road now or hereafter constructed or acquired and comprised in the mortgage, and ten thousand dollars (\$10,000) for every mile of narrow gauge road, now or at any time hereafter constructed or acquired, and comprised in the mortgage. The mortgage deed shall provide for the immediate issue and delivery by the mortgage trustee to the mortgagor Company of ten million, five hundred thousand dollars, (\$10,500,000) of the new bonds in nominal amount; and that thereafter the trustee of the mortgage shall further issue one hundred thousand dollars (\$100,000) par value of such bonds for each mile of road constructed between the present terminus, near Ashland, and the California state line, and fifty thousand dollars, (\$50,000) par value of such bonds for each ten miles of steel rails laid down on the present lines of the Oregon and

California Railroad Company, after such deposit of existing
 298 bonds; and on the completion of a rail connection between the present line of the Oregon and California Railroad Company and the line of the Central Pacific Railroad Company, any unissued bonds for which the mileage shall then be constructed, shall be delivered. Provided, however, that such aggregate issue, including the amount to be delivered to the bondholders' committee hereunder, shall not exceed the limit of thirty thousand dollars (\$30,000) and ten thousand dollars (\$10,000) for each constructed mile of standard and narrow gauge line respectively, nor twenty million dollars (\$20,000,000) in all. For any additional mileage constructed or acquired, either between Junction and Corvallis, or elsewhere in Oregon, the mortgage trustee shall deliver the sum of thirty thousand dollars (\$30,000) par value for each mile of standard gauge road, and the sum of ten thousand dollars (\$10,000) par value for each mile of narrow gauge road; the mortgage trustee, however, not to be compelled to accept less than ten miles of road at any one time, except in case of terminal sections. Deliveries of bonds under such mortgage are to be made by the trustee from time to time upon presentation to it of affidavits of the President and Chief Engineer of the Railway Company making such mortgage, to the facts authorizing delivery of such bonds under this Article, and without other evidence or proof thereof. In no event, however, is the total issue of bonds secured by said new mortgage, to exceed for all the purposes in this Article mentioned, the aggregate of the sum of twenty million dollars (\$20,000,000), the form of such new bond, which is to be of one thousand dollar (\$1,000) denomination, and of the mortgage securing the same, and of the guaranty, and to be approved by the counsel of the bond-

299 holders' committees." And Article fifteen thereof provides as follows:—"Fifteenth,—The Southern Pacific Company agrees to execute a lease of the railroad of the Oregon and California Railroad Company, or its successors, for a period of at least forty years from the date of the issue of the new bonds, and such Railroad Company agrees to execute such lease, and such lease is to form part of the consideration of the guaranty by the Southern Pacific Company of the new bonds aforesaid. Any infirmity or invalidity of or in said lease shall not be deemed a breach of this agreement by

the Southern Pacific Company, or the Oregon and California Railroad Company, or its successors, nor shall it in anywise affect the validity, legality or sufficiency of the guaranty of such new bonds by the Southern Pacific Company". And Article sixteen thereof provides as follows:—"Sixteenth:—The Pacific Improvement Company and the Southern Pacific Company further agree that upon the issue of the new bonds, hereinbefore referred to, the second mortgage bonds of the said Oregon and California Railroad Company, which shall have heretofore been delivered by the stockholders' committee to the Pacific Improvement Company, as hereinbefore prescribed, shall be cancelled; and thereupon, unless the counsel of the Southern Pacific Company and the bondholders' committees should otherwise determine, the first mortgage bonds which shall have been deposited by the bondholders' committees hereunder, shall also be cancelled. Upon the cancellation of such second mortgage bonds, the Pacific Improvement Company shall thereupon take all proper proceedings to have the mortgage securing the same, satisfied of record. As soon as all outstanding bonds not deposited by the bondholders' committees with the Union Trust Company, as hereinbefore provided, shall have been paid, or otherwise satisfied, all proper proceedings shall be taken to have the mortgage securing such now existing first mortgage bonds of the Oregon and California Railroad Company satisfied of record, unless in the joint judgment of the counsel for the Southern Pacific Company and the Bondholders' committees, it should be deemed more expedient not then to have said mortgage so satisfied. And it duly appearing that all parties in interest, save and except a few of the holders of undeposited first mortgage bonds, and whose interests are fully protected under said agreement, have by their execution of said agreement assented to and desire that the prayer of the petitioner be granted, and that the stockholders of petitioner have at a regular meeting thereof, fully ratified said agreement; and it also appearing that the granting of said petition will tend to a speedy and amicable adjustment of all matters in controversy in this suit:—

It is therefore considered, ordered and adjudged That the injunction heretofore granted herein on January nineteenth, one thousand eight hundred and eighty-five, be and the same is hereby modified, so far as to permit the said Oregon and California Railroad Company to issue the new bonds hereinbefore mentioned in Article third of said agreement, hereinbefore recited, to the extent and in the manner in said article specified, and to execute the mortgage to secure said issue, to the extent and in the manner described in said article, and to execute the lease mentioned in the fifteenth Article of said agreement, hereinbefore recited, but that possession shall not be taken under said lease, until the Receiver heretofore appointed shall have been discharged, and until the suit in which he was appointed shall have been terminated.

At Chambers, December 20th, 1887.

(Signed)

DEADY, J.

301 THE UNITED STATES OF AMERICA,
District of Oregon, ss:

I, R. H. Lamson, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of Order has been by me compared with the original and that it is a correct transcript therefrom, and of the whole of such original as the same appears of record and on file at my office and in my custody.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Portland in said District this Dec. 20, 1887.

(Signed)

R. H. LAMSON, *Clerk.*

302 *Consent of the Preferred Stockholders of the Oregon and California Railroad Company to the Execution of an Agreement of Lease with the Southern Pacific Company.*

Whereas on the second day of June, 1881 the Oregon and California Railroad Company entered into a certain agreement with Henry Villard, Robert Davie Peebles, and Charles Edward Bretherton, which agreement related to the preferred stock of said Company and was for the protection of the owners thereof, And

Whereas, said agreement, among other things, provided that no sale, disposition, incumbrance or lease of the said railroad or any part thereof, or any mortgage or issue of bonds, except the first mortgage bonds at the rate of Twenty thousand Dollars per mile, or any operating, traffic or running contract in the nature of a lease, or which should change the management or operation of the road, or any part of it, to another Company, or any consolidation with another Company, or any lease of the railroad of another Company, or any guaranty or assumption of the liabilities of any other Company of bonds, coupons, dividends or otherwise, or of supplementary articles of incorporation of the Company, or any increase in the preferred or common stock, should be made or be valid without the consent of an absolute majority in amount, of all the preferred stock actually issued and outstanding; And

Whereas, said Oregon and California Railroad Company is desirous of executing an agreement of lease to and with the Southern Pacific Company which agreement of lease is in words and figures as follows:

303 This agreement, made this first day of July, 1887, between

The Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, and The Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky: Witnesseth:

That the said Oregon and California Railroad Company hereby leases to the said Southern Pacific Company for the term of forty (40) years from the date hereof, all of its railroad situated in the State of Oregon known as the Oregon and California Railroad with

all its branches, together with the rolling stock, telegraph lines, tools and property of every kind and nature whatsoever in use upon or in connection with the said railroad and together with all the appurtenances thereunto belonging, with the right to possess, maintain, use and operate the said property and to receive the rents, issues and profits thereof.

304 In consideration thereof the said Southern Pacific Company agrees to and with the said Oregon and California Railroad Company that during the continuance of this lease it will keep the said leased property in good order, condition and repair, operate, maintain, add to and better the same at its own expense, pay all taxes legally assessed against the same or levied thereon and pay the interest as it shall mature on such First Mortgage Bonds of said Oregon and California Railroad Company secured by indenture or deed of trust to the Union Trust Company of New York, dated July 1st, 1887, as may be issued in respect of the now existing lines or the extension now under construction of the main line to the boundary between Oregon and California, or as may be hereafter guaranteed by said Southern Pacific Company, and that it will on the first day of May in each year during the continuance of this lease pay to said Oregon and California Railroad Company such balance if any of the net earnings or income received by said Southern Pacific Company from the said leased premises with the appurtenances for the year ending on the thirty-first day of December then next preceding as shall remain in its hands after all charges and expenses incurred by it hereunder and all the payments for taxes and interest hereinbefore provided for or agreed or directed to be made, and all current fixed charges of the Oregon and California Railroad Company, and all indebtedness of said Railroad Company to said Southern Pacific Company are paid, Provided that if such balance of net earnings or income received by the Southern Pacific Company from the said leased premises with the appurtenances for any year, which by the foregoing provisions hereof, would be and become payable by said Southern Pacific Company to said Oregon and California Railroad Company, shall exceed the amount of seven per centum upon the par value of the then existing preferred stock of the Oregon and California Railroad Company, and six per cent per annum upon the then existing common stock of the Oregon and California Railroad Company, shall be entitled to and shall retain to itself for its own use any and all excess of such balance of net earnings and income over and above the amounts of seven per centum per annum upon the par value of the preferred stock and six per centum per annum upon the par value of the common stock of said Oregon and California Railroad Company; and said Southern Pacific Company further agrees to and with the said Oregon and California Railroad Company that it will upon the termination of this lease return the said premises to the said Oregon and California Railroad Company or its successors with its additions and betterments in as good condition and repair as the same were at the date hereof; and in further consideration of this lease it has agreed to execute and will execute

a guaranty of the payment of the principal and interest of such of the bonds of the issue above mentioned as may be issued in respect of its now existing lines or the extension now under construction of its main line to the boundary between Oregon and California and of such further bonds of said issue as the said Oregon and California Railroad Company may during the existence of this lease request it to guarantee.

It is understood and agreed that the mortgage from the Oregon and California Railroad Company to the Union Trust Com-
 306 pany of New York bearing date July 1st, 1887, and the bonds issued thereunder have and shall have priority of lien upon the mortgaged property over the lien and claim of the Southern Pacific Company as lessee hereunder.

In testimony whereof, the parties hereto have caused these presents to be signed by their respective Presidents and their respective corporate seals to be hereunto affixed and attested by their respective Secretaries the day and year first above written.

And

Whereas, said Company desires the consent of an absolute majority in amount, of the holders of all the preferred stock to the execution of said agreement of lease, and

Whereas, of said preferred stock there have been issued and are now outstanding one hundred and twenty thousand shares; and

Whereas, the undersigned, owners of said stock are of the opinion that it is for the best interests of said Oregon and California Railroad Company that such an agreement of lease should be executed in manner and form as above set out;

Now, Therefore, in consideration of the premises, the undersigned, respectively the holders of the number of shares of said preferred stock set opposite their names, do hereby consent to the execution of said Agreement of Lease, and do hereby, so far as they can so do, authorize and empower the directors of said Company to cause said Agreement of Lease to be executed and delivered.

307 Names of Subscribers.	Number of Shares Held.
(Signed) Pacific Improvement Co., by F. S. Douty, Sec'y	119,025 shares
(Signed) Leland Stanford, by Ariel Lathrop, att'y in fact	5 shares
(Signed) C. P. Huntington, by E. H. Miller, Jr., att'y in fact	5 shares
(Signed) Chas. F. Crocker	5 shares
(Signed) W. V. Huntington	5 shares
(Signed) Timothy Hopkins	5 shares

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this Sixth 6th day of December, A. D. One thousand Eight hundred and Eighty seven (1887) before me E. B. Ryan, a Notary Public in and for said City and County, duly commissioned and

sworn, personally appeared F. S. Douty, known to me to be the Secretary of the Corporation described in and who executed the within and annexed instrument and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[SEAL.]

(Signed) E. B. RYAN,
Notary Public in and for the City and
County of San Francisco, State of California.

308 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this Sixth (6th) day of December, in the year One thousand Eight hundred and Eighty seven before me, E. B. Ryan, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Ariel Lathrop, known to me to be the person described in and whose name is subscribed to the within instrument as the Attorney in fact of Leland Stanford and the said Ariel Lathrop acknowledged to me that he subscribed the name of Leland Stanford thereto as principal and his own name as Attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[SEAL.]

(Signed) E. B. RYAN,
Notary Public in and for the City and
County of San Francisco, Cal.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this Twelfth (12th) day of December in the year One thousand Eight hundred and Eighty seven, before me E. B. Ryan, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally — E. H. Miller, Jr., known to me to be the person described in and whose name is subscribed to the within instrument as the Attorney in fact of C. P. 309 Huntington and the said E. H. Miller, Jr., acknowledged to me that he subscribed the name of C. P. Huntington thereto as Principal and his own name as Attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

(Signed)

E. B. RYAN,
Notary Public in and for the City and
County of San Francisco, Cal.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this Twelfth (12th) day of December, A. D. One thousand Eight hundred and Eighty seven (1887), before me, E. B. Ryan, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Chas. F. Crocker, Timothy Hopkins and W. V. Huntington, known to me to be the persons described in and who executed, and whose — are subscribed to the within instrument and each duly acknowledged to me that he executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal, the day and year in this Certificate first above written.

[SEAL.]

E. B. RYAN,

*Notary Public in and for the City and
County of San Francisco, State of California.*

310 *Assent of Trustees for the Holders of the Preferred Stock of
the Oregon and California Railroad Company to the Execu-
tion of an Agreement of Lease to and with the Southern Pacific
Company.*

Whereas, by an instrument in writing bearing date the second day of June, 1881, the Oregon and California Railroad Company entered into an Agreement with Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, which agreement relates to the preferred stock of said Company and was for the protection of the owners thereof; and

Whereas, said agreement, in Article Nineteen thereof, provided that in case of the death, resignation, refusal or incapacity to act of any Trustee and in the event of there being no surviving trustee, new trustees should be appointed by any Judge of the Circuit Court of the United States for the District of Oregon, by an instrument under his hand and seal; and

Whereas said trustees, Henry Villard, Robert Davie Peebles and Charles Edward Bretherton resigned their office as trustees leaving no surviving trustees; and

Whereas, pursuant to the provisions of said Article Nineteen of said agreement above mentioned the Honorable Matthew P. Deady, Judge of the Circuit Court of the United States for the District of Oregon, by an instrument under his hand and seal appointed the undersigned as trustees for the holders of said preferred stock of said Oregon & California Railroad Company as successors to said Henry Villard, Robert Davie Peebles and Charles Edward Bretherton; and

Whereas said agreement, among other things, provided, that no sale, disposition or incumbrance, or lease of the Oregon and California Railroad or any part of it, or any mortgage, or issue
311 of bonds, except the first mortgage bonds at the rate of
Twenty thousand Dollars a mile, or any operating, traffic or

running contract in the nature of a lease, or, which shall transfer the management or operation of the road, or any part of it to another Company, or any consolidation with another Company, or any lease of the railroad of another Company or any guarantee or assumption or assumption of the liabilities of any other Company for bonds, coupons, dividends or otherwise, or any supplementary articles of incorporation of the Company, or any increase of the preferred or common stock, should be made, or be valid, without the consent of an absolute majority in amount of all the preferred stock actually issued and outstanding; and

Whereas said Oregon and California Railroad Company is desirous of executing an agreement of lease to and with the Southern Pacific Company which agreement of lease is in words and figures as follows:

(Here follows copy of agreement of lease dated July 1, 1887.)

And

Whereas, of said preferred stock there have been issued and are now outstanding One hundred and Twenty thousand shares; and

Whereas, the holders of — shares of said Preferred Stock, being more than an absolute majority in amount of all of said stock actually issued and now outstanding, have consented to the execution of said Agreement of Lease; and

Whereas, the undersigned trustees, are of the opinion that it is for the best interests of said Oregon and California Railroad Company and of said holders of said preferred stock that said agreement of lease should be executed in manner and form as above set out;

Now, Therefore, in consideration of the premises, the undersigned trustees for said preferred stockholders, do hereby assent to the execution of said agreement of lease.

(Signed)

S. T. GAGE.

(Signed)

N. T. SMITH.

(Signed)

W. E. BROWN.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this Ninth (9th) day of December, A. D. One thousand Eight hundred and Eighty seven (1887) before me, E. B. Ryan, a Notary Public in and for said City and County residing therein duly commissioned and sworn, personally appeared S. T. Gage, N. T. Smith and W. E. Brown, known to me to be the persons and trustees described in and who executed and whose names are subscribed to the within instrument and they severally and duly acknowledged to me that they executed the same as such Trustees.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.]

(Signed)

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

313 On motion of Mr. J. McCracken, seconded by Mr. Donald Macleay, the following preamble and resolution were unanimously adopted.

Whereas, this company desires to raise money to pay off and discharge its indebtedness incurred and to be incurred in the construction, completion, betterment and equipment of its lines of railroad; and

Whereas, to that end it is deemed advisable and advantageous to this Company to issue bonds to an amount not exceeding Twenty million Dollars, and as security for the payment thereof, to execute and deliver to the Union Trust Company of New York, a mortgage or deed of trust of its property; and

Whereas, the holders of the majority of the preferred stock of this Company, by an instrument in writing duly executed, consented to the execution and delivery of said deed of trust and to the issuance of the bonds secured thereby; and

Whereas, by an instrument in writing duly executed, the trustees for the holders of the preferred stock of this Company assented to the execution and delivery of said deed of trust and to the issuance of the bonds secured thereby; and

Whereas, by an instrument in writing duly executed, the holders of a majority of the common stock of this Company consented to the execution of said deed of trust and to the issuance of the bonds secured thereby;

Now, therefore, for the purposes aforesaid,

Be it resolved, That the bonds of this Company be issued to a number not exceeding Twenty thousand, in the sum of One thousand Dollars each, bearing date the first day of July, 1887, payable to the Union Trust Company of New York, a corporation
314 organized and existing under the Laws of the State of New York, Trustee, or to the holder thereof, forty years from the date thereof with interest at the rate of five per centum per annum, payable Semi-annually on the first day of January and the first day of July in each year ensuing its date, both principal and interest payable in Gold Coin of the United States at the office or agency of this Company in the City of New York.

Be it further resolved, That to each of said bonds there shall be attached Eighty coupons or Interest Warrants numbered respectively from one to eighty, both inclusive, and that all of said coupons or interest warrants shall bear the engraved signature of the Treasurer, which shall be treated in fact and in law as equivalent to a manual signing by said officer.

Be it further resolved, That upon each of said bonds there shall be endorsed a certificate as follows, to be signed by said Union Trust Company of New York, Trustee:

"The Union Trust Company of New York hereby certifies that the within bond is one of the bonds described in the deed of trust within mentioned and secured thereby."

Be it further resolved, That to secure the payment of said bonds to be executed and issued as aforesaid, with the interest to accrue thereon, A Deed of Trust be made to the Union Trust Company of

New York, a corporation organized and existing under the laws of the State of New York, as Trustee, for the holders of said bonds upon all the railways and railway lines of this Company and its successors whether constructed or to be constructed or acquired, and all their appurtenances, including therein all rights of way, superstructure, rails, tracks, sidetracks or siding, bridges, buildings, fences, depots, station houses, shops, warehouses, offices, docks ferries, ferry boats and landings, telegraph lines, car houses, engine houses machine shops, repair shops, buildings, erections and structures necessary to the operating of said railways or said railway lines, and all and singular the locomotives, rolling stock, equipment and machinery appertaining thereto, whether now owned or hereafter to be acquired; and also

All the rents, issues, tolls, incomes, earnings and profits of such railways and railway lines; and also

All the rights, privileges, immunities and franchises relating or pertaining to such railway or railway lines which this Company now possesses, owns or is entitled unto, or it or its successors may hereafter become possessed of or entitled, unto, and all the property, real, personal or mixed, which on the 12th day of May, 1887, was covered by the mortgage securing the then existing first mortgage bonds of this Company, except the amounts due for lands sold previous to such last mentioned date, and except the cash in hands of the Trustee under the mortgage last referred to, and all extensions thereof and future acquired property in the State of Oregon of this Company, and also

All the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of this Company and its successors, of, in and to the premises and every part and parcel thereof, with the appurtenances.

Be it further resolved, That the net proceeds from the sale of lands belonging to this Company, sold subsequent to May 12, 1887, constitute a fund for the payment and redemption of said bonds secured by the said deed of trust, as in said deed of trust provided.

Be it further resolved, That the President and Secretary be and they are hereby authorized, empowered and directed, as its act and deed, to make, execute and deliver under their hands and the name and corporate seal of this Company, the said deed of trust and the said bonds.

Be it further resolved, That said Deed of Trust shall be in form as follows, and that the said bonds and coupons shall be of the form set out in said deed of trust:

317 An Indenture made the first day of July, in the year of our Lord one thousand eight hundred and eighty-seven, by and between the Oregon and California Railroad Company, a corporation created, organized and existing under the laws of the State of Oregon, party of the first part, and the Union Trust Company of New York, a corporation created, organized and existing under the laws of the State of New York, party of the second part.

Whereas, The party of the first part is the owner of lines of railway already constructed from East Portland to Ashland, from Albany Junction to Lebanon, and from Portland to Corvallis, all in the State of Oregon, and of lands granted under the Acts of Congress respectively entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon," approved July 25, 1866, and "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon," approved May 4, 1870, and is about extending to the California State line such railway now constructed from East Portland to Ashland.

And whereas, The party of the first part and its successors are about to execute and issue, from time to time, (but with the limitations hereinafter prescribed in respect to the aggregate amount thereof which may at any time be outstanding, which amount is not in any case to exceed, at the par or face value of such bonds, the sum of twenty million dollars), first mortgage bonds for one thousand dollars each of the general form and tenor following, to-wit:

318

UNITED STATES OF AMERICA.

Oregon and California Railroad Company.

First Mortgage Gold Bond.

No. —.

No. —.

The Oregon and California Railroad Company, for value received, promises (unless this bond should be sooner redeemed as hereinafter provided) to pay to the bearer hereof, or, if registered, to the registered holder hereof, the sum of one thousand dollars, forty years after date, and, on presentation and surrender at or after maturity of the respective interest warrants hereunto annexed, to pay to the person presenting the same, or, if this bond is registered and the interest warrants appertaining thereto cancelled, to pay to the registered holder hereof, interest on such principal sum at the rate of five per centum per annum semi-annually, on the first day of January and July in each year, such payments of principal and interest to be made at the office or agency of said company in the City of New York, in United States gold coin.

This is one of the first mortgage bonds of said Railroad Company, the total issue of which is limited to twenty million dollars par value, secured by a deed of trust to the Union Trust Company of New York, dated July 1, 1887.

The net proceeds of lands sold subsequent to May 12, 1887, and of the lands included in said deed of trust securing such first mortgage bonds, are to be applied to the redemption and cancellation of such bonds (illegible in record) at par, unless purchasable (illegible in record) as prescribed in said deed of trust.

319 The principal of this bond may, by reason of one year's default in the payments of any interest, become and be due and payable as provided in said deed of trust.

None of said bonds are to be in anywise binding or obligatory unless authenticated by the certificate endorsed thereon, signed by said Trustee or its successor or successors in said trust.

This bond may at any time, upon production thereof to said Railroad Company and proper endorsement being made thereon, and either with or without the surrender to said Railroad Company for cancellation of all unpaid interest warrants appertaining thereto, be registered upon the books of the Company in the name of the holder thereof, and thereupon its transferability by delivery will cease, and thereafter it can be transferred only by the registered holder or his attorney by transfer duly made upon such books.

In witness whereof, the said Railroad Company has caused these presents to be signed by its President, and its corporate seal to be affixed thereto and attested by its Secretary, this first day of July, one thousand eight hundred and eighty-seven.

OREGON AND CALIFORNIA RAILROAD
COMPANY,

[SEAL.] By ———, *President.*

Attest:.

———, *Secretary.*

And whereas The general form of the several interest warrants to be annexed to such bonds (each of which interest warrants is to bear the engraved signature of the Treasurer of the Railroad Company) is to be as follows, viz:

(*Form of Interest Warrant.*)

320 Interest warrant for twenty-five dollars gold, being for semi-annual interest maturing on the first day of ——— upon the Oregon and California Railroad Company's first mortgage bond No. — \$25. (Not due if bond previously redeemed.)

———, *Treasurer.*

And whereas, The form of the certificate to be endorsed on the bonds, and signed by said Trustee, is to be as follows, viz:

(*Form of Trustee's Certificate.*)

The Union Trust Company of New York hereby certifies that the within bond is one of the bonds described in the deed of trust within mentioned and secured thereby.

———, *Trustee.*

And whereas, All the said bonds are to be equally secured by mortgage and hypothecation of the railways and railway lines of the party of the first part, and its successors constructed and to be constructed or acquired, and of all their appurtenances and the franchises relating or pertaining thereto,

And whereas, Such issue of bonds, and the execution of this mortgage or deed of trust to secure the same, has been assented to by the holders of upwards of a majority of the preferred stock and by the holders of upwards of a majority of the common stock of the party of the first part,

Now therefore this Indenture witnesseth, That the party of the first part, in consideration of the premises, and of one dollar to it paid by the party of the second part, the receipt whereof is hereby

acknowledged, and for the purpose of securing the payment

321 of such bonds, with the interest to accrue thereon, according to the true intent and meaning thereof, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remis-, release, convey and confirm unto the said party of the second part, and its successors and assigns forever, all the railways and railway lines of the party of the first part, and its successors, whether constructed or to be constructed or acquired, and all their appurtenances, including therein all rights of way, superstructures, rails, tracks, side tracks or sidings, bridges, buildings, fences, depots, station-houses, shops, warehouses, offices, docks, ferries, ferry-boats and landings, telegraph lines, car-houses, engine-houses, machine shops, repair shops, buildings, erections and constructures necessary to the operation of said railways or said railway lines and all and singular the locomotives, rolling stock, equipment and machinery appertaining thereto, whether now owned or hereafter to be acquired; and also, all the rents, issues, tolls, incomes, earnings and profits of such railways, and railway lines; and also, all the rights, privileges, immunities and franchises relating or pertaining to such railways or railway lines which the said party of the first part now possesses, owns or is entitled unto, or it or its successors may hereafter become possessed of or entitled unto, and all the property, real, personal or mixed, which on the 12th day of May, 1887, was covered by the mortgage securing the then existing first mortgage bonds of the Oregon and California Railroad Company, except the amounts due for lands sold previous

322 to such last mentioned date, and except the cash in the hands of the trustee under the mortgage last referred to, and all extensions thereof and future acquired property in the State of

Oregon of the said party of the first part; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, and its successors, of, in and to the premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and its successors and assigns forever, in trust, nevertheless, for the security and benefit of all and every the

persons or bodies corporate who or which shall be or at any time become the holders or holder of any such bonds, or the interest warrants appertaining thereto, without preference to the holder of any of the said bonds or interest warrants over any of the others, by reason of priority in the date thereof or the time of the issuing or negotiating of the same.

Provided always, and these presents are upon the express condition, that if the party of the first part, or its successors or assigns, shall well and truly pay or cause to be paid to the holders of the said bonds and interest warrants, when and as the same shall become due and payable the principal and interest moneys secured hereby, according to the terms, provisions, and conditions, tenor and effect of the said bonds, then these presents and the estate hereby granted shall cease, determine, and be null and void.

And it is covenanted and agreed by and between the parties hereto, that until default shall be made by the said party of the first part, its successors and assigns, in the payment of the principal or
 323 interest of the said bonds, or some of them, or some part thereof, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess and enjoy the said premises, with their appurtenances, and all and singular the rights and franchises hereinbefore described, and to receive, take, and use the tolls, income, earnings, and profits thereof, and the trustee or trustees hereunder shall have full power, in its or their discretion, upon written request of the party of the first part, its successors or assigns, assented to in writing by the Southern Pacific Company, the guarantor of both the principal and interest of bonds secured by this deed of trust, to convey, by way of release or otherwise, and fully release from the lien of this mortgage, any property of any description (except lands granted by the United States) which in its or their judgment shall not be necessary for or for use in connection with said railways, and to consent to such changes in the location of tracks, depots and other buildings as in its or their judgment may be expedient, and to make and deliver the releases and conveyances necessary to carry the same into effect, but any property which may be acquired for permanent use in substitution for any so released or conveyed shall thereupon become subject to the lien of this mortgage, and upon request of the trustee or trustees hereunder shall be conveyed to it or them by the party of the first part, its successors or assigns, upon the trusts of these presents.

But if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, according to the tenor and effect of
 324 said bonds, or either of them, and if such default shall continue for the period of one year, then, and in that case the party of the second part or its successors in the trust, are hereby authorized and empowered, and at the written request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, it shall be its and their duty to enter into and upon, and take and hold possession of, all and singular the premises, estates, franchises, rights, privileges and prop-

erty hereby granted and conveyed, or intended so to be, and in person, or by one or more agents, to operate the said railways, to make from time to time all such repairs and replacements as it or they may deem judicious, and all such useful alterations, additions and improvements as the income coming into its or their hands shall be adequate to pay for, and to take, collect and receive all fares, freights, tolls, earnings, issues, profits and income of said railways, and apply such fares, freights, tolls, earnings, issues, profits and income to the proper expenses of holding, operating and managing the said railways and other premises, and conducting the business thereof, to the payment of and of all taxes and assessments which shall be levied or assessed thereon, and all the necessary and proper repairs, replacements, alterations, additions and improvements upon said property, and all expenses, costs, charges and counsel fees in the premises of said party of the second part, or its successors in the trust, and a reasonable compensation for its or their services, and next to the payment of the interest and principal of the said bonds, according to the tenor and effect thereof, as the

325 same may be or become due and payable, and in case the principal moneys secured by such bonds shall not have become due, the moneys applicable to the payment of interest shall be applied upon the interest warrants remaining in default, in the order of their maturity; in case the said principal moneys shall have become due, the moneys applicable to the payment of the principal and interest on such bonds shall be applied to such principal and interest pro rata without any preference or priority whatsoever.

And further, if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds, or any or either of them, or any part thereof, and if such default in the payment of such interest moneys shall continue for the period of one year; then, and in either of such cases the said party of the second part, or its successors in the said trust, may, and in the latter case at the written request of holders of one-fourth of the said bonds then outstanding in respect of which such default shall have been made, must, and it and they are hereby authorized and empowered and directed to cause the whole of the said premises, estates, franchises, rights, privileges and property hereby granted and conveyed, or intended so to be, with their appurtenances, and all benefit and equity of redemption of the said party of the first part, and its successors and assigns therein or thereto, to be sold at public auction in the City of New York, in the State of New York, or the City of Portland, in the State of Oregon, giving at least three months' previous notice of the time and place of such sale, by publishing the same at least once in each week during such period of three months,

326 in two newspapers published in said City of New York and two newspapers published in said City of Portland, and one newspaper published in the City of London, England, and one newspaper published in the City of Frankfort-on-the-Main, Germany, and giving such other notice of such sale as may be required by law, if any other notice be so required.

And it shall be lawful for the said party of the second part or its

successors making such sale, and it and they are hereby authorized and empowered, as the attorney or attorneys of the party of the first part, and its successors, by these presents duly constituted and appointed for that purpose, to make, execute and deliver to the purchaser or purchasers on such sale, all such deeds and conveyances as shall be necessary or proper to convey and assure to, and vest in, him or them, the said premises, estates, franchises, rights, privileges and property, and every part and parcel thereof, and all of the estate right, title and interest of the said party of the first part, and its successors and assigns therein or thereto; and such sale, and the deeds and conveyances so to be thereupon executed, shall be valid and effectual forever, and shall be perpetual bar both in law and equity, against the said party of the first part and its successors and assigns, and against all persons claiming or to claim by, from or under it or them, or any of them.

And it is further declared and agreed, that the receipt of the Trustee or Trustees who shall make the sale hereinbefore authorized shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase money, and that such purchaser
 327 or purchasers, his or their heirs or assigns or personal representatives, shall not, after paying such purchase money and receiving such receipt of such Trustee or Trustees therefor, be obliged to see to the application of such purchase money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase money by the Trustee or Trustees.

And it is hereby declared and agreed, that the said party of the second part, or its successors in the said trust, shall out of the proceeds of such sale, or of any sale which shall, under judicial proceedings or otherwise, be made of the said premises in enforcement of the security afforded by these presents, in the first place, pay and retain the costs and expenses attending such sale, and all counsel fees and other expenses incurred by it or them in reference to the same, and a reasonable compensation for its or their own services in the premises; and also any balance which may be due to it or them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by it or them, including the reasonable compensation of any agent or agents who may be employed in or about such care and management, and shall apply the residue of the proceeds of such sale, or so much thereof as may be necessary to the payment of the whole amount of principal and interest which shall then be owing and unpaid upon the bonds secured hereby, or any of them, whether the said principal, by the tenor of the said bonds, be then due or yet to become due. And in
 328 case of a deficiency of such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, and without discrimination as between principal and interest, and without preference of the holder of any one bond or interest warrant over any of

the others; and any surplus which may remain after the full payment of the principal and interest of all of the said bonds shall be paid over to the said party of the first part, or its successors or assigns, upon lawful demand being made therefor.

And it is hereby further provided, covenanted, declared and agreed that if default shall be made in the payment of the interest moneys mentioned in the said bonds or any or either of them, or any part thereof, and if such default shall continue for the period of one year, then and in that event the party of the second part, or its successors in the trust, may, and upon the written request of the holders of one-fourth part of the said bonds then outstanding in respect of which such default shall have been made, must declare the entire principal of all said outstanding bonds to be immediately due and payable; and thereupon the said entire principal shall become and be immediately due and payable, anything contained in said bonds to the contrary thereof notwithstanding.

And it is hereby further provided, covenanted, declared and agreed that a majority in amount of the holders of the outstanding bonds at any time secured by these presents, may, by written instrument, at any time before the actual sale of the premises, waive any default in payment of interest, but so far only that the principal of the bonds shall cease to be payable forthwith, in case the said
329 principal shall have become so payable by reason of such default; but such waiver shall be of no effect, unless assented to in writing by the Southern Pacific Company, the guarantors of both the principal and interest of the bonds secured by this deed of trust and unless the party of the first part, its successors and assigns, shall, together with said waiver and assent hand to the said party of the second part or its successors in the trust, a sum of money to pay all the interest in arrear, and the said party of the second part or its successors in the trust, shall then proceed to pay said interest.

And it is hereby further provided, declared, granted and agreed, that upon the happening of such event or events as is or are hereinbefore declared, agreed or provided to authorize or direct the said party of the second part, or its successors, to sell the said premises, estates, franchises, rights, privileges and property, or to take the requisite proceedings to that end, the said party of the second part, or its successors, shall be entitled, in its or their discretion, instead of taking proceedings for and making sale of said premises, estates, franchises, rights, privileges, and property, under and in virtue of the power of sale hereinbefore contained, to proceed by bill in equity, or other appropriate proceedings, in any court or courts of competent jurisdiction, to foreclose this mortgage or enforce the rights, liens and securities of the Trustee or Trustees and the bondholders thereunder, and in such suit or proceedings to obtain the appointment of a receiver or receivers to be nominated by it or its successors in the trust; and thereupon said Trustee or Trustees shall
330 be entitled to have the said premises, estates, franchises, rights, privileges and property hereby granted or conveyed or intended so to be, sold by judicial sale under the order or decree of such court or courts, for or towards the satisfaction of the

principal and interest due or owing upon the then outstanding bonds, issued under or entitled to the benefit of the security of this mortgage, and for the enforcement of the rights, liens and securities of the Trustee or Trustees and the bond-holders; and in case of such judicial sale, the net proceeds thereof shall be applicable and distributable in like manner as hereinbefore provided in respect of the net proceeds of sale of such mortgaged premises and properties, rights and franchises under and in virtue of the power of sale hereinbefore contained; and all the stipulations and provisions in this indenture contained with reference to or consequent upon a sale of such mortgaged premises and properties, rights, immunities and franchises, when or if sold under said power of sale, shall be applicable and applied as far and as nearly as may be, in case of such judicial sale being made under the order or decree of the Court.

And it is hereby further provided, covenanted, declared and agreed that on any sale, whether by the said party of the second part, its successors in the trust, or a court, of the property hereby conveyed, or any part thereof, the said party of the second part, or its successors in the trust, shall have the right to buy in the same and a majority in amount of the holders of the outstanding bonds shall have the right by written instrument to fix a sum which it shall be the duty of the said party of the second part, or its successors in the trust, to bid for the property to be sold on behalf and for the benefit of such bondholders, but only on condition that due provision is made by such majority to the satisfaction of the said party of the second part, or its successors in the trust, or the Court as the case may be, for the payment in cash of all expenses incurred in the execution of the trusts of these presents and of the proportion of such sum payable to the bondholders not concurring in such request. And on any such purchase the said party of the second part or its successors in the trust, shall hold the property so purchased for the equal benefit of the bondholders who had required the said party of the second part, or its successors in the trust to buy in the property on their behalf, as the absolute property of said bond holders, without any right of redemption or resale in favor of the party of the first part, its successors and assigns.

And it is hereby further provided, declared and agreed that in case of such sale as is hereinbefore authorized being made by the party of the second part or its successors in said trust, or in case of any judicial sale being made of the said premises, properties, rights and franchises hereby mortgaged, or any part thereof in enforcement of the mortgage lien hereby created, the purchaser or purchasers at such sale shall be entitled, in making settlement for and payment of the purchase money bidden at such sale, to turn in or use towards the payment of such purchase money the bonds held by such purchaser or purchasers, to or towards the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds, or the amount so turned in or used of the same for such purpose, at such sum as would be payable out of the net pro-

ceeds of such sale to such purchaser or purchasers, as
 331½ holder or holders of such bonds, for his or their just share
 or proportion of such net proceeds of sale, upon due ap-
 portionment of and concerning such net proceeds.

And it is hereby further provided, covenanted, agreed and de-
 clared that any request or instrument by these presents, authorized
 to be executed by any number of bondholders shall prima facie be
 deemed to be sufficiently made, executed, evidenced and proved by
 a written instrument or instruments purporting to be signed by
 such bondholders, and stating the identifying numbers and the
 amount of the bonds held by each signatory and the respective sig-
 natures to which, and the production to a notary public at the time
 of signature of the bonds specified, shall be acknowledged before
 and certified to by such notary public, and his certificate attached
 and authenticated by his notarial seal. No proof shall be necessary
 of the qualifications or identity of any such notary, so purporting
 to act in the United States, the British Dominion, Holland, France,
 or the German Empire.

And the said party of the first part, for itself, its successors and
 assigns, doth hereby covenant, grant and agree to and with the
 said party of the second part, and its successors in the trust, and to
 and with the respective persons and corporations who or which shall
 at any time become holders of the said bonds hereby secured, or
 any of them, that the said party of the first part, its successors and
 assigns, shall and will at any time and from time to time hereafter,
 upon request, make, do, execute and deliver all such further and
 other acts, deeds and things as shall be reasonable advised, devised
 or required to effectuate the intention of these presents, and to
 assure and confirm to the said party of the second part, or its
 332 successors, all and singular the property and estate, real and
 personal, hereinbefore described, and hereby intended to be
 granted, and so as to render the same, and especially such por-
 tions thereof as shall be hereafter acquired by the said party of the
 first part, or its successors, available for the security and satisfaction
 of the said bonds, according to the intent and purposes herein ex-
 pressed.

And it is hereby further provided, covenanted, declared and
 agreed that the party of the first part, its successors and assigns, will
 and hereby doth absolutely and irrevocably waive the benefit or ad-
 vantage of any and all valuation, stay, appraisement or redemption
 laws, or laws requiring liens or mortgages to be foreclosed by action
 or suit, and of all other laws now existing or hereafter passed, which,
 but for this provision, would prevent the absolute and unconditional
 sale of the premises hereby conveyed by a court or by a trustee with-
 out suit; and on any such sale the party of the first part, for itself,
 its successors and assigns, covenants to join in and confirm the con-
 veyance to the purchaser.

And it is hereby further provided, covenanted, declared and agreed
 that the mileage rate of issue of bonds hereunder is to be thirty thou-
 sand dollars par value of bonds for each mile of standard gauge road
 now or hereafter constructed or acquired and comprised in this

mortgage, and ten thousand dollars par value of such bonds for every mile of narrow gauge road now or at any time hereafter constructed or acquired and comprised in this mortgage; that the party 332½ of the second part and its successors in the trust hereby created are forthwith upon the request of the party of the first part, its successors or assigns, to authenticate and certify as issued hereunder and to deliver to the party of the first part, its successors or assigns, bonds of said party of the first part or its successors of the general form and tenor above set forth, to the amount of ten million five hundred thousand dollars, and after from time to time to further authenticate and certify as issued hereunder and deliver to the party of the first part, its successors or assigns, such bonds, to amounts which shall aggregate one hundred thousand dollars par value of such bonds for each mile of road constructed between the terminus of said road, near Ashland, as existing on the 28th day of March, 1887, and the California State Line, and fifty thousand dollars par value of such bonds for each ten miles of steel rails laid down after the 12th day of May, 1887, on the lines of the Oregon and California Railroad Company, as such lines existed on the 28th day of March, 1887; and on the completion of a rail connection between the line of the Oregon and California Railroad Company, as existing at the last mentioned date, and the line of the Central Pacific Railroad Company, any unissued bonds for which the mileage shall then be constructed, shall be authenticated and certified by the Trustee and delivered, provided, however, that such aggregate issue, including the amount to be forthwith authenticated, certified and delivered hereunder, shall not exceed the limits of thirty thousand dollars and ten thousand dollars for each constructed mile of standard and narrow gauge line, respectively, or twenty million dollars 333 in all. For any additional mileage constructed or acquired either between Junction and Corvallis or elsewhere in Oregon, the said party of the second part or its successors in the trust shall authenticate and certify as issued hereunder and deliver thirty thousand dollars par value of such bonds for each mile of standard gauge road, and ten thousand dollars par value of such bonds for each mile of narrow gauge road; the said party of the second part or its successors in the trust, however, not to be compelled to accept less than ten miles of road at any one time, except in case of terminal sections. Authenticating certificates to such bonds are to be signed and deliveries thereof to be made by the Trustee under this mortgage from time to time, upon presentation to it of certificates in writing, executed by the President and Chief Engineer of the party of the first part, or its successors, reciting the facts authorizing delivery of such bonds hereunder; such certificates to be personally acknowledged by such officers to be true before a Notary Public of either of the States of New York, California or Oregon, and without other evidence or proof of such facts. Provided, however, that notwithstanding anything herein contained, the party of the first part or its successors, may at any one time, or from time to time, require the party of the second part and its successors to authenticate, certify and deliver to said party of the first part, its successors or assigns, and permit the

sale of such amount or amounts of bonds as the party of the first part or its successors may think fit, provided that the proceeds of any such bonds issued in excess of the limits hereinabove prescribed shall

be received by the Trustee or Trustees hereunder and not by
334 the party of the first part or its successors or appointees, and shall be disbursed by the said Trustee or Trustees to the party of the first part, or its successors or appointees, only pro rata as and when the party of the first part or its successors would have been entitled to receive such bonds under the foregoing provisions hereof, but the total issue of bonds secured by this deed of trust is not in any event to exceed for all purposes herein mentioned the aggregate sum of twenty million dollars.

In case the party of the first part, or its successors, shall contract to sell and dispose of any of the lands granted by the United States and covered by this mortgage at prices which are assented to by the party of the second part, or its successors in this trust or its or their agent or agents on that behalf, then and in that event the party of the second part, or its successors in the trust, or any agent or agents on its or their behalf authorized so to do, shall execute such releases and conveyances as may fully discharge the lands so contracted to be sold from the lien of these presents.

Provided, however, that in all cases the purchase money or price be paid to and received by the party of the second part, or its successors in the trust, or its or their duly authorized agent. For the purpose of facilitating such sales the Trustees hereunder may, from time to time, either concur with the party of the first part or its successors in appointing an agent to make such sales and execute such releases as its attorney in fact, or may appoint an agent of its own to

execute such releases and conveyances as its attorney in fact,
335 and it may delegate to any such agent all its powers and duties in respect to the sale of lands.

The proceeds of lands so sold shall be applied by the said party of the second part, or its successors in the trust, to the redemption and cancellation of the bonds to be issued hereunder in the following manner, viz.: If the market price of such bonds should be below par, then and in that event such proceeds of lands may be used in purchasing the same at their market price at the discretion of the said party of the second part, or its successors in the trust. But in case, in the opinion of the said party of the second part, or its successors in the trust, such bonds cannot be purchased at less than par, then and in that event, as soon as the sum of fifty thousand dollars shall have accumulated from such proceeds of lands, the Trustee shall cause to be drawn at its office in the City of New York in the presence of a notary public out of the numbers of the bonds then outstanding, the numbers of such amount of said bonds as said land monies will suffice to redeem at par with accrued interest and such land monies shall, on the first day of January or July next ensuing such drawing, be applied to the payment of such bonds so drawn at par with accrued interest to such date. The party of the second part, or its successors in the trust, shall, upon the said drawing being made, without delay, send notice of the numbers so drawn to the

Secretaries of the Stock Exchange at New York, London and Frankfort, and the party of the first part shall, upon the said drawing being made, without delay, cause notice of the numbers so drawn to be advertised once a week, for at least four weeks, in a daily newspaper in

New York, London and Frankfort. If the said party of the
336 first part shall fail to make all or any of the said advertisements, the party of the second part, or its successors in the trust, shall cause them to be made, and the party of the first part shall repay to the party of the second part, or its successors in the trust, the cost thereof. But until such payment the party of the second part, or its successors in the trust shall defray the cost thereof out of the funds in its or their hands under these presents. Bonds so drawn and advertised shall bear no interest after the next ensuing first day of January or the first day of July unless on presentation thereof at the office of the said party of the second part, or its successors in the trust, in New York, payment of the said bonds or the accrued interest thereon shall be refused. All bonds purchased or redeemed as hereinbefore provided shall be forthwith cancelled.

And it is hereby further provided, declared and agreed that any vacancy in the office — Trustee hereunder may be permanently filled by the appointment of a new Trustee or new Trustees by an instrument or concurrent instruments in writing, executed under the hands of the holders of a majority in interest of the then outstanding bonds secured hereby, or their attorneys in fact hereunto authorized, but that the Board of Directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above prescribed.

And it is hereby covenanted and agreed, that any new Trustee or Trustees, appointed as aforesaid, whether by a permanent or temporary appointment, shall immediately upon its, his or their
337 appointment, and without any further act, deed or conveyance, become and be vested with all of the estates, trusts, rights, powers and duties of the Trustee or Trustees in whose place it, he or they shall have been appointed; but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall and will, upon request, make execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new Trustee or new Trustees, such estates, trusts, rights, powers and duties, according to the intent above expressed.

And the said party of the second part does hereby accept the trust conferred upon it by these presents, but with the understanding, and it is hereby expressly provided and agreed that it shall not be liable or accountable for the acts, defaults or neglect of any agent or agents who may, in good faith and with reasonable discretion, be appointed under and by virtue of or for the purposes of these presents to do any of the matters or things herein provided for and that no other liability or responsibility shall, under any circumstances, be borne by or attached to it than for the exercise of reasonable diligence only in the performance of the said trusts, when action on its part

for that purpose shall become necessary. The party of the second part is to be entitled to compensation for services in the execution of this trust.

In witness whereof, the parties hereto have caused their respective corporate seal to be hereunto affixed and attested by their respective Secretaries, and these presents to be signed by their respective Presidents the day and year first above written.

In the presence of.

338 Be it further resolved, That the mileage rate of issue of the bonds herein provided for and authorized, is to be Thirty thousand Dollars par value of bonds for each mile of Standard gauge road now or hereafter constructed or acquired and comprised in this mortgage, and Ten thousand Dollars par value of such bonds for every mile of Narrow gauge road now or at any time hereafter constructed or acquired, and comprised in this mortgage.

Be it further resolved, That the said Union Trust Company of New York, and its successors in the trust hereby created, be and it is hereby authorized upon the request of this Company, its successors or assigns to authenticate and certify as issued hereunder and to deliver to this Company, its successors or assigns, said bonds, to the amount of Ten million five hundred thousand Dollars and thereafter from time to time to further authenticate and certify as issued hereunder and deliver to this Company, its successors or assigns, such bonds to amounts which shall aggregate One hundred thousand Dollars, par value of such bonds for each mile of road constructed between the terminus of said road near Ashland, as existing on the 28th day of March, 1887, and the California State Line and Fifty thousand Dollars par value of such bonds for each ten miles of steel rails laid down after the 12th day of May, 1887, on the lines of this Company, as such lines existed on the 28th day of March, 1887, and on the completion of a rail connection between the line of the Oregon and California Railroad Company as existing at the last mentioned date and the line of the Central Pacific Railroad Company, any unissued bonds for which the mileage shall then

339 be constructed, shall be authenticated and certified by the Trustee and delivered, provided, however, that such aggregate issue, including the amount to be forthwith authenticated, certified and delivered hereunder, shall not exceed the limits of Thirty Thousand dollars and Ten thousand Dollars for each constructed mile of Standard and Narrow gauge line, respectively, or Twenty million Dollars in all.

Be it further resolved, That for any additional mileage constructed or acquired either between Junction and Corvallis or elsewhere in Oregon, the said Union Trust Company of New York or its successors in the trust, shall authenticate and certify as issued hereunder and deliver Thirty thousand Dollars par value of such bonds, for each mile of Standard gauge road, and Ten thousand

Dollars par value of such bonds for each mile of Narrow gauge road, the said Union Trust Company of New York or its successors, in the trust, however, not to be compelled to accept less than ten miles of road at any one time, except in case of terminal sections. Authenticating certificates to such bonds shall be signed, and deliveries thereof shall be made by the Trustee under said mortgage from time to time, upon presentation to it of certificates in writing, executed by the President and Chief Engineer of this Company, or its successors, reciting the facts authorizing the delivery of such bonds, such certificates to be personally acknowledged by such officers to be true before a Notary Public of either of the States of New York, California or Oregon, and without other evidence or proof of such facts.

340 Provided, however, That notwithstanding anything herein contained, this Company or its successors may at any one time, or from time to time require the Union Trust Company of New York and its successors to authenticate, certify and deliver to this Company, its successors and assigns and permit the sale of such amount or amounts of bonds as this Company or its successor, may think fit, provided that the proceed of any such bonds issued in excess of the limits hereinabove prescribed shall be received by said Trustee or Trustees and not by this Company or its successors or appointees and shall be disbursed by said Trustee or Trustees to this Company or its successors or appointees, only pro rata as and when this Company or its successors would have been entitled to receive such bonds.

Be it further resolved, That the President and Secretary be and they are hereby authorized, empowered and directed, as its act and deed, to make, execute and deliver under their hands and the name and corporate seal of this Company, the deed of trust, and the bonds hereinbefore provided for.

Be it further resolved, That the net proceeds from the sale of lands belonging to this Company sold subsequent to May 12, 1887, constitute a fund for the payment and redemption of said bonds secured by the deed of trust aforesaid, as in said deed of trust provided.

Resolved, On motion of Director Donald Macleay, that the Second Vice President and Secretary pro tem of this Company are authorized, as its act and deed, to execute and attach thereto the corporate seal of this Company, an agreement of Lease with the Southern Pacific Company in words and figures as follows:

341 This agreement, made this first day of July, 1887, between The Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, and The Southern Pacific Company, a corporation, duly organized and existing under the laws of the State of Kentucky.

Witnesseth: That the said Oregon and California Railroad Company hereby leases to the said Southern Pacific Company for the

term of forty (40) years from the date hereof, all of its railroad situated in the State of Oregon known and designated as the Oregon and California Railroad with all its branches, together with the rolling stock, telegraph lines, tools and property of every kind and nature whatsoever in use upon or in connection with the said railroad and together with all the appurtenances thereunto belonging, with the right to possess, maintain, use and operate the said property and to receive the rents, issues and profits thereof.

In consideration thereof the said Southern Pacific Company agrees to and with the said Oregon and California Railroad Company that during the continuance of this lease it will keep the said leased property in good order, condition and repair, operate, maintain, add to and better the same at its own expense, pay all taxes legally assessed against the same or levied thereon and pay the interest as it shall mature on such of the First Mortgage Bonds of said Oregon and California Railroad Company secured by indenture or deed of trust to the Union Trust Company of New York, dated July 1st, 1887, as may be issued in respect of its now existing lines or the extension now under construction of its main line to the boundary between Oregon and California, or as may be hereafter guaranteed by said Southern Pacific Company, and that it will on the first day of May in each year during the continuance of this lease pay to said Oregon and California Railroad Company such balance if any of the net earnings or income received by said Southern Pacific Company from the said leased premises with the appurtenances for the year ending on the thirty-first day of December then next preceding as shall remain in its hands after all charges and expenses incurred by it hereunder and all the payments for taxes and interest hereinbefore provided for or agreed or directed to be made, and all current fixed charges of the Oregon and California Railroad Company, and all indebtedness of said Railroad Company to said Southern Pacific Company are paid, Provided, that if such balance of net earnings or income received by the Southern Pacific Company from the said leased premises with the appurtenances for any year, which by the foregoing provisions hereof, would be and become payable by said Southern Pacific Company to said Oregon and California Railroad Company, shall exceed the amount of seven per centum upon the par value of the then existing preferred stock of the Oregon and California Railroad Company, and six per cent per annum upon the value of the then existing common stock of said Oregon and California Railroad Company, then and in that event the said Southern Pacific Company shall be entitled to and shall retain to itself for its own use any and all excess of such balance of net earnings and income over and above the amounts of seven per centum per annum upon the par value of the preferred stock and six per centum per annum upon the par value of the common stock of said Oregon and California Railroad Company; and said Southern Pacific Company further agrees to and with the said Oregon and California Railroad Company that it will upon the termination of this lease return the said premises to the said Oregon and California Railroad Company or its suc-

cessors with its additions and betterments in as good condition and repair as the same were at the date hereof; and in further consideration of this lease it has agreed to execute and will execute a guaranty of the payment of the principal and interest of such of the bonds of the issue above mentioned as may be issued in respect of its now existing lines or the extensions now under construction of its main line to the boundary between Oregon and California and of such further bonds of said issue as the said Oregon and California Railroad Company may during the existence of this lease request it to guarantee.

It is understood and agreed That the mortgage from the Oregon and California Railroad Company to the Union Trust Company of New York bearing date July 1st, 1887, and the bonds issued thereunder have and shall have priority of lien upon the mortgaged property over the lien and claim of the Southern Pacific Company as lessee hereunder.

In testimony whereof, The parties hereto have caused these presents to be signed by their respective Presidents and their respective corporate seals to be hereunto affixed and attested by their respective Secretaries the day and year first above written.

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— — —

344 The Second Vice President presented to the board a certified copy of a resolution passed by the Board of Directors of the Southern Pacific Company authorizing the guaranty by said Company of the payment of the principal and interest of this Company's new bonds to be issued as provided by resolution;

Whereupon on motion of Director D. Macleay seconded by Director R. P. Earhart, it was unanimously resolved that the Secretary pro tem be and he is hereby ordered and directed to spread upon the records of this meeting a copy of the said resolution of guarantee in words and figures as follows, to wit:

Whereas, The Oregon and California Railroad Company by indenture bearing date the first day of July, 1887, made with the Union Trust Company of New York, authorized the issuance from time to time (but with certain limitations therein prescribed, in respect to the aggregate amount thereof, which might, at any time be outstanding, which amount was not, in any case, to exceed at the par or face value of such bonds, the sum of Twenty million Dollars) first mortgage bonds of one thousand dollars each of the form and tenor prescribed in said indenture; And

Whereas, By said indenture, the payment of said bonds, principal and interest, was secured by a mortgage lien upon the property of said Oregon and California Railroad Company; And

Whereas, On the first day of July, 1887, the said Oregon and California Railroad Company, by agreement in writing, made with this Company, did lease to this Company for the term prescribed in said lease, all of the mortgaged property; And

345 Whereas, Part of the consideration of said lease was that

this Company should guarantee the punctual payment of the principal and interest of all of said bonds, and should agree that the mortgage given to secure its payment shall have priority of lien upon the mortgaged property over its liens and claims thereon, as lessee; And

Whereas, It was further agreed that such guaranty should be endorsed upon each of said bonds and that the same should be signed by the Treasurer and attested by the corporate seal of this Company;

Now therefore, in consideration of the premises it is resolved,— That the Treasurer of this Company be and he is hereby authorized, as the act and deed of this Company, to endorse upon each of said bonds of said Oregon and California Railroad Company, issued under and secured by the indenture of mortgage or deed of trust dated the first day of July, 1887, which may be delivered to the Union Trust Company of New York, for delivery to the bondholders of the Company or their nominees, under the agreement dated March 28, 1887, and upon such other of said bonds, of the issue above mentioned as may be issued in respect of its now existing lines or the extension of its main line now in course of construction to the boundary line between Oregon and California guarantee in words and figures as follows:

For value received the Southern Pacific Company hereby guarantees the punctual payment of the principal and interest upon this bond, as therein provided, and agrees that the mortgage given to secure its payment shall have priority of lien upon the
346 mortgaged property, over its lien and claims thereon as lessee of the Oregon and California Railroad Company.

In witness whereof, the corporate seal of the Southern Pacific Company is hereto affixed and attested by the Treasurer by order of the Board of Directors, this — day of December, 1887.

— — —, *Treasurer.*

Attest:

— — —.

Resolved: That the Treasurer of this Company be, and he is hereby authorized and directed to affix its corporate seal to the guaranty aforesaid, and its Treasurer to attest the same.

I, E. H. Miller, Jr., Secretary and keeper of the records of the proceedings of the Board of Directors of the Southern Pacific Company, do hereby certify that the foregoing is a true and correct copy of a preamble and resolutions adopted by the Board of Directors of said Company on the Fifteenth day of December, 1887, as the same now appear of record in the minutes of the proceedings of said Board.

In testimony whereof, I have hereunto set my hand as Secretary of the Southern Pacific Company and affixed its corporate seal, this 15th day of December, 1887.

[SEAL.]

(Signed)

E. H. MILLER, JR.

347 On motion of Mr. J. McCracken seconded by Mr. W. W. Bretherton, the following resolution was unanimously adopted, viz:

Whereas, Neither the Secretary nor the Assistant Secretary of this corporation is present at this meeting and are both absent from the state; and

Whereas, Geo. H. Andrews has been appointed as Secretary pro tem. of the meeting:

Now therefore, be it Resolved, That said Secretary pro tem. be, and he is hereby authorized and empowered, in the absence of the regular Secretary, to certify whenever it shall be necessary for any purpose, the records, or any of the records or proceedings of this meeting, and to attach and affix the corporate seal of this Company, to such certification and authentication thereof, and that when said certification and authentication shall be so made, that it shall have the same force and validity as if certified by the regular Secretary of this Corporation.

On motion of Mr. Donald Macleay, seconded by Mr. J. McCracken, the board adjourned.

R. KOEHLER,
2nd Vice President.

GEO. H. ANDREWS,
Secretary pro tem.

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OFFICE OF THE OREGON AND
CALIFORNIA RAILROAD Co.,
PORTLAND, OREGON, June 6th, 1888.

Pursuant to adjournment the Board of Directors met at the office of the Company, Portland, Oregon, this day at 11 o'clock A. M.

Present:

2nd Vice President and Director R. Koehler.

Directors R. P. Earhart, W. W. Bretherton, Donald Macleay, John McCracken and Director and Secretary Geo. H. Andrews.

The minutes of the last regular meeting were read and approved.

On motion of Mr. W. W. Bretherton seconded by Mr. Donald Macleay, the following resolutions were unanimously adopted, viz:

Resolved, That Geo. H. Andrews, Secretary of this Company, be and he is hereby authorized and directed to receive and take over from R. Koehler, the Receiver of the property of this Company, all the property of this Company, real, personal and mixed, now in his custody as such Receiver, and which he is directed by the U. S. Circuit Court to turn over to this Company.

Be it Further Resolved, That the Secretary be and he is hereby authorized and directed to receipt to said Receiver in the name of and on behalf of this Company and under its corporate seal for all such property thus turned over to him.

On motion of Mr. John McCracken seconded by Mr. R. P. Earhart, the following resolution was unanimously adopted, viz:

Resolved That the action of the 2nd Vice President and Secretary of the Company in executing on behalf of this Company and under the corporate seal of this Company an agreement between
 349 Aaron Rose and wife and the O. & C. R. R. Co. dated April 21st, 1888, in regard to a right of this company to take and use water from certain springs near Roseburg depot, be and the same is hereby in all respects confirmed and approved.

No further business appearing on motion of R. P. Earhart, seconded by John McCracken, the Board adjourned.

R. KOEHLER,
2nd Vice President.

GEO. H. ANDREWS,
Secretary.

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OFFICE OF THE OREGON AND
 CALIFORNIA RAILROAD COMPANY,
 PORTLAND, OREGON, June 11, 1888.

Pursuant to Article XIV of the By Laws, the Board of Directors met at the office of the Company, Portland, Oregon, this day at 11 o'clock A. M.

Present:

R. Koehler, 2nd Vice President and Director.

Directors Donald Macleay, John McCracken, R. P. Earhart and W. W. Bretherton, and Director and Secretary Geo. H. Andrews.

The minutes of the last regular and adjourned regular meetings were read and approved.

On motion of Mr. Donald Macleay seconded by Mr. W. W. Bretherton the following resolutions were unanimously adopted, viz:

Whereas, Geo. H. Andrews, Secretary of this Company, has been designated by resolution of this Board, duly passed at a meeting held on June 6th, 1888, to receive from the Receiver of the property of the Oregon and California Railroad Company, all the property, real, personal and mixed in his custody as such Receiver, and to receipt to him for the same.

And whereas, The Company has heretofore and on the 1st day of July, 1887, leased to the Southern Pacific Company, all its railroads, together with the rolling stock, telegraph lines, tools and property of every kind and nature, whatsoever in use upon or in connection with the said railroad and together with all the appurtenances thereunto belonging;

And whereas, This Company entered into an agreement with the Southern Pacific Company dated December 31st, 1887, by virtue of and under which this Company has agreed to deliver and
 351 turn over to said Southern Pacific Company the amount of available surplus as of July 1st, 1887, together with the material and supplies on hand.

And whereas, Under and pursuant to said agreement of lease of

July 1, 1887, above referred to the surplus earnings of this Company's railroads and other property from said date last named were for and on account of said Southern Pacific Company as lessee.

Now therefore be it resolved:

First. That Geo. H. Andrews be and he is hereby authorized and directed to turn over to the Southern Pacific Company or its authorized agent, all the railroad lines, together with the rolling stock, telegraph lines, tools and property of every kind and nature whatsoever in use upon or in connection with the said railroads, together with all the appurtenances thereunto belonging, except the cash on hand.

Second. That Geo. H. Andrews be and he is hereby authorized and directed to turn over and deliver the cash received from the Receiver R. Koehler, to Timothy Hopkins, Esq., Treasurer of the Southern Pacific Company.

On motion of Mr. John McCracken, seconded by Mr. R. P. Earhart, the Board adjourned until 11 o'clock A. M. on Wednesday next, the 13th inst.

R. KOEHLER,
2nd Vice President.

GEO. H. ANDREWS,
Secretary.

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OFFICE OF THE OREGON AND
CALIFORNIA RAILROAD CO.,
PORTLAND, ORE., June 27, 1888.

Pursuant to adjournment the Board of Directors met at the office of the Company, Portland, Oregon, this day at 11 o'clock A. M.

Present:

2nd Vice President and Director R. Koehler.

Directors R. P. Earhart, John McCracken, W. W. Bretherton and Donald Macleay, and Director and Secretary Geo. H. Andrews.

The minutes of the last regular meeting were read and approved.

Secretary Geo. H. Andrews informed the Board that in conformity with resolutions of the Board passed at the last meeting he had received from R. Koehler on the 11th instant the railroads and property of this Company in his charge as Receiver of the U. S. Circuit Court and had receipted to him for the same, and also in conformity with said resolutions did on the 11th instant (at midnight) turn over the railroad and property of this Company received from Receiver Koehler, and the cash and surplus received from Receiver R. Koehler, to the Southern Pacific Company and presented to the Board the receipt of the Southern Pacific Company for the same. Said receipt was received and ordered spread upon the minutes of this meeting and was in words and figures as follows, to-wit:

"Whereas, The undersigned was duly appointed Manager of the Southern Pacific Company for the lines in Oregon;

Now therefore, I. R. Koehler, Manager, hereby acknowledge to have received, under the lease dated July 1st, 1887, between the Oregon and California Railroad Company and the Southern Pacific Company, the following property of the said Oregon and California Railroad Company, to-wit:

The following railroad lines of said Company:

East Side Division from Portland to Roseburg.....	197.7	miles.
Southern Extension from Roseburg to Ashland.....	145	"
Lebanon Branch from Albany Junct. to Lebanon....	11.5	"
West Side Division from Portland to Corvallis.....	96.8	"
Total	451.0	"

Together with the following rolling stock, to-wit:

Locomotives	43
Passenger coaches	26
President's car	1
Baggage and smoking cars	4
Baggage cars	4
Mail and express cars	4
Baggage, mail and express	3
Caboose cars	10
Stock cars	23
Box cars	373
Flat cars	187
Pile driver car	1
Steam shovel	1
Dump cars	40
Hand and push cars	180
Ferry Boat No. 2	1

354 And together with the telegraph lines, tools and property of every kind and nature whatsoever in use upon or in connection with the said railroads, and together with all the appurtenances thereunto belonging, including fuel, ties, material and supplies, subject however to detail inventories of the material, supplies, fuel and tie accounts to be made and receipted for hereafter separately.

Portland, June 11th, 1888.

R. KOEHLER,

Manager Southern Pacific Company Lines in Oregon.

I, George H. Andrews, Local Treasurer of the Southern Pacific Company, hereby acknowledge that I have received from the Secretary of the Oregon and California Railroad Company the amount of \$397,000.00 in cash.

Portland, June 11th, 1888.

GEO. H. ANDREWS,
Local Treasurer."

On motion of Mr. Donald Macleay, seconded by Mr. J. McCracken, the following resolution was unanimously adopted, viz:

Whereas, This Company in a suit instituted by it in which the Southern Pacific Company and the Farmers Loan and Trust Company were defendants, obtained a decree authorizing and directing the cancellation of the Mortgage executed by this Company to Henry Villard, Horace White and Charles Edward Bretherton, dated June 1st, 1881, and

Whereas, in pursuance of said decree the Oregon and
355 California Railroad Company is required, for the purpose of securing the payment of the few remaining outstanding bonds, to give a bond of indemnity, the nature and purport of which is more specifically set forth in the form thereof given below;

Resolved, That the Second Vice President and the Secretary be and they are hereby authorized and directed to execute and deliver, on behalf and under the corporate seal of this Company, a bond, of which the following is a copy, to-wit:

"Whereas, On the first day of June in the year 1881, the Oregon and California Railroad Company, a corporation organized and existing under the laws of Oregon, made and executed to Henry Villard, Horace White and Charles Edward Bretherton, of the City and State of New York, as trustees, parties of the second part, its certain Deed of Mortgage and Trust, which deed of Mortgage and Trust was given to secure a certain issue of bonds by said Railroad Company, and commonly known as the First Mortgage Bonds;

And whereas, By various changes, the Farmers Loan and Trust Company, a corporation existing under the laws of the State of New York, is now under the provisions of said Deed of Trust and Mortgage, the sole Trustee thereunder;

And whereas, There have been issued and secured by said Deed of Mortgage and Trust, aforesaid, the amount of Nine thousand and twenty bonds of one thousand dollars each, and bearing interest as in said Deed of Mortgage and Trust provided;

And whereas, A certain suit was instituted by the Oregon and California Railroad Company, Complainant, against the Farmers
Loan and Trust Company and the Southern Pacific Company,

356 Defendants in the Circuit Court of the United States for the District of Oregon, which suit was instituted on the Twelfth day of June, 1888, the objects of said suit being to secure the satisfaction on the record of the said Deed of Mortgage and Trust aforesaid, to require certain payments to be made by the Farmers Loan and Trust Company to the Oregon and California Railroad Company, and to cancel Eight thousand five hundred and thirteen of said first mortgage bonds owned or controlled by the Southern Pacific Company, and Four hundred and fifteen of said first mortgage bonds in the Sinking Fund provided for in said Deed of Trust and Mortgage;

And whereas, it appeared by the bill in said suit that ninety two of the said first mortgage bonds are outstanding in hands other than the Southern Pacific Company and the said sinking fund;

And whereas, In said suit a decree was, on the Twenty fifth day of

June, 1888 duly made and entered of record, which decree was in words and figures following, that is to say:

"In the Circuit Court of the United States for the District of Oregon.

No. 1463.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Complainant,
vs.

THE FARMERS LOAN AND TRUST COMPANY and THE SOUTHERN
PACIFIC COMPANY, Defendants.

JUNE 25, 1888.

Now at this day this cause comes on to be heard, pursuant to stipulation of the parties herein, upon the bill and amend-
357 ment thereto, and the respective answers of the defendants herein to said bill and amendment, on motion for decree according to the prayer of said bill, the complainant appearing by Mr. John W. Whalley, of counsel, and the defendant, The Farmers Loan and Trust Company, appearing by Mr. W. B. Gilbert, of counsel, and the defendant the Southern Pacific Company, appearing by Mr. Edwin H. Peery, its counsel, and after hearing the argument of the respective counsel, on the matter of said motion, it is ordered, adjudged and decreed:

First. That the Farmers Loan and Trust Company be and it is hereby required, on presentation to it at the office of said company in the City of New York, of the eight thousand five hundred and thirteen of the first mortgage bonds mentioned in the bill herein, and owned or controlled by the Southern Pacific Company, to cancel the same and to endorse upon each of said bonds a statement to the effect that said bond has been duly delivered up and cancelled in accordance with this decree; and also to cancel such other of the remaining outstanding ninety two first mortgage bonds mentioned in the bill and not included in the four hundred and fifteen first mortgage bonds now in the Sinking Fund as described in said bill, as may be presented to the Farmers Loan and Trust Company for said purpose, and thereupon to endorse the statement aforesaid upon each of said bonds so cancelled.

Second. That upon the cancellation of all of said eight thousand five hundred and thirteen first mortgage bonds owned or controlled by the Southern Pacific Company, and upon the execution
358 and delivery of the bond of the Oregon and California Railroad Company with sureties as hereinafter mentioned, the Farmers Loan and Trust Company be, and it is hereby adjudged and decreed, also to cancel the four hundred and fifteen first mortgage bonds in the Sinking Fund as aforesaid, and thereupon to pay over to the Oregon and California Railroad Company the balance of moneys now in its hands for sinking fund purposes, after deducting therefrom the amount agreed to be due to it, and which sum, after so deducting the said amount, is One hundred and fifty seven thou-

and, One hundred and Ninety five dollars and eleven cents, together with interest thereon at two per cent per annum from June first, One thousand eight hundred and eighty eight until paid, and thereupon the said Farmers Loan and Trust Company shall upon the presentation to it of a copy of the bond of the Oregon and California Railroad Company hereinafter mentioned, certified by the Clerk of this Court and it is hereby decreed and required to execute and acknowledge according to the laws of the State of Oregon, a satisfaction and release of the mortgage given by the said Oregon and California Railroad Company to secure said bonds bearing date June first, One thousand, eight hundred and eighty-one, and to deliver the same to the Oregon and California Railroad Company, to be by it recorded in the several counties where said mortgage is recorded.

Third. That after the cancellation of the said eight thousand five hundred and thirteen of said first mortgage bonds as aforesaid, the Oregon and California Railroad Company may at any time, execute and deliver its bond of indemnity to the Clerk of this Court, for the benefit of whom it may concern, with sufficient sureties, to be approved by the Clerk of this Court, who shall be house-
 359 holders and freeholders of the State of Oregon, in a sum equal to double the face value of such of the ninety two first mortgage bonds mentioned in the bill as may be outstanding at the date of the execution and delivery of said bond of indemnity, conditioned that if the said Oregon and California Railroad Company shall well and truly pay, or cause to be paid, whatever amounts may be due upon any of said ninety two first mortgage bonds, when and as the same shall have been duly and properly presented for payment, then said obligation to be void; otherwise to remain in full force and effect.

Fourth. That upon the execution and delivery of said bond of indemnity, and upon the cancellation of said eight thousand five hundred and thirteen first mortgage bonds before mentioned, and the four hundred and fifteen bonds now in the hands of the said Trust Company in the Sinking Fund mentioned in the bill, it is further adjudged and decreed that the Oregon and California Railroad Company shall thereupon be discharged and released from all obligation and liability to deposit with said Farmers Loan and Trust Company the moneys which it has already received, or may hereafter receive, for or on account of any sale of lands of the Oregon and California Railroad Company, prior to the discharge of said mortgage.

Lastly. It is further adjudged and decreed, that upon proof to the satisfaction of this Court that the terms of this decree have been complied with, or upon other showing made, the complainant herein may apply for further relief or final decree, as it may be advised.

(Signed)

DEADY, J."

360 And whereas, Since the rendition of said decree, there has been cancelled under the terms thereof by the said Farmers Loan and Trust Company, the said eight thousand five hundred and

thirteen first mortgage bonds, owned or controlled by the Southern Pacific Company, and the said Farmers Loan and Trust Company has also cancelled — of the remaining ninety two first mortgage bonds aforesaid, and which since said decree have been presented to it for such cancellation, leaving at the date hereof only — of said ninety two of said first mortgage bonds now outstanding;

And whereas, The Oregon and California Railroad Company desires to secure the cancellation also of the said four hundred and fifteen bonds now in the Sinking Fund, mentioned in said decree, and the payment of the moneys by the Farmers Loan and Trust Company as provided in said decree, and the execution and delivery of the satisfaction and release of the said deed of Mortgage and Trust by the Farmers Loan and Trust Company, in said decree mentioned;

Now therefore, In consideration of the premises, Know All Men by these Presents, that the Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, as principal, and — of — and — of — as sureties, hereby acknowledge themselves held and firmly bound unto whomsoever it may concern in the sum of — Dollars, lawful money of the United States, for the payment whereof well and truly to be made, we, and each of us, do hereby jointly and severally
361 bind ourselves, our heirs, executors, administrators, assigns and successors, respectively, firmly by these presents. Sealed with our seals, and dated at Portland, Oregon, this — day of — A. D. Eighteen hundred and Eighty eight.

The condition of the foregoing obligation is such, that if the said Oregon and California Railroad Company shall well and truly pay, or cause to be paid, whatever amounts may be due upon any of said ninety two first mortgage bonds, now outstanding and uncanceled, when and as the same shall have been duly and properly presented for payment, then the foregoing obligation is to be void, otherwise to be and remain in full force and effect.

In witness whereof, The Oregon and California Railroad Company, as principal, pursuant to a resolution of its Board of Directors, duly passed, has caused its Second Vice President and Secretary to execute these presents and affix its corporate seal hereunto, and the said sureties have also hereto subscribed their names and affixed their seals on this day and year last above written.

Provided, however, That the sum to be named in said bond shall not exceed double the amount of the face value of the remaining outstanding bonds.

No further business appearing, on motion duly seconded, the Board adjourned.

R. KOEHLER,
2nd Vice President.

GEO. H. ANDREWS, *Secretary.*

362 OFFICE OF THE OREGON AND CALIFORNIA RAILROAD CO.,
PORTLAND, OREGON, November 24, 1890.

Pursuant to Article XIV of the By Laws the Board of Directors met at the office of the Company, Portland Oregon, this day at 11 o'clock A. M.

Present:

2nd Vice President and Director R. Koehler, Director John McCracken, Director and Secretary Geo. H. Andrews.

On motion duly seconded the Board adjourned until 11:30 o'clock A. M. on Tuesday the 25th instant.

R. KOEHLER,
2nd Vice President.

GEO. H. ANDREWS, *Secretary.*

363 OFFICE OF THE OREGON AND CALIFORNIA RAILROAD CO.,
PORTLAND, OGN., November 25, 1890.

Pursuant to adjournment the Board of Directors met at the office of the Company, Portland, Oregon, this day at 11:30 o'clock A. M.

Present:

2nd Vice President and Director R. Koehler, Directors Donald Macleay, John McCracken, R. P. Earhart and W. W. Bretherton. Director and Secretary Geo. H. Andrews.

The minutes of the last regular meeting were read and approved.

On motion of Director J. McCracken, seconded by Director R. P. Earhart, the following resolution was unanimously adopted, viz:

Resolved, That the 2nd Vice President and the Secretary be and they are hereby authorized and directed to execute on behalf and under the corporate seal of this Company an agreement with the Southern Pacific Company in words and figures as follows, to-wit:

"This agreement, Made the 20th day of November, 1890 by and between the Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, and the Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky;

Witnesseth, whereas, On the first (1st) day of July, 1887, the said corporations, parties hereto, entered into an agreement in writing, whereby said Oregon and California Railroad Company leased to the said Southern Pacific Company its railroad and other
364 property for the term of forty (40) years from said first (1st) day of July, 1887.

And whereas, Some questions have arisen between said parties as to the construction to be given to certain clauses of said lease, as to the manner of ascertaining the net profits to be divided thereunder, and it is desirable that said questions shall be settled by an agreement between said parties;

Now therefore, In consideration of the premises and agreements

hereinafter made, the parties hereto agree each with the other as follows, to-wit:

First. The net profits under said agreement of lease hereinbefore referred to shall be ascertained by said Southern Pacific Company by deducting from the gross receipts from all of said leased property, all expenses of operation, repairs and maintenance of said property, and also all payments for interest, taxes, and all other expenditures made on account of said Railroad Company provided to be made by the terms of said lease, excepting the expenditures made by said Southern Pacific Company for betterments and additions to said leased property.

Second. The annual net profits so ascertained shall be paid by the said Southern Pacific Company to said Oregon and California Railroad Company; if there be any net profits, provided, that such net profits shall not exceed the amount of seven per centum upon the par value of the then existing preferred stock of the Oregon and California Railroad Company, and six per centum upon the par value of the then existing common stock of the Oregon and California Railroad Company, but if such net profits shall exceed

365 the amount of seven per centum upon the par value of the then existing preferred stock of the Oregon and California Railroad Company, and six per centum upon the par value of the then existing common stock of the Oregon and California Railroad Company, the said Southern Pacific Company shall be entitled to and shall retain to itself for its own use any and all excess of net profit over and above the amounts of seven per centum upon the par value of said preferred stock of said Oregon and California Railroad Company and six per centum upon the par value of said common stock thereof. If, for any year, there should be a net deficit, such amount of deficit will in the same manner be paid by said Oregon and California Railroad Company.

Third. Betterments and additions to said leased property shall be made by the said Southern Pacific Company; the settlements therefor shall be made annually at the same time that payment is made for the net profits or net deficit, as hereinbefore provided; in said settlement the whole amount of payments for such betterments and additions made during the year by said Southern Pacific Company, shall become a charge to said Oregon and California Railroad Company to be paid by it to the said Southern Pacific Company.

In testimony whereof, The parties hereto have caused these presents to be executed on the day and year first hereinabove written."

366 Resolved, That the 2nd Vice President and Secretary of this Company be and they are hereby authorized and directed to execute on behalf of this Company and under its corporate seal a quit claim deed to J. G. Fuller for that portion of the right of way heretofore granted by him to this Company, which is located on the now abandoned line in Cow Creek Canyon, and which it has been agreed upon to quit claim to him in part consideration for a

deed of right of way for the new location of this Company's line on the opposite side of the Creek over the homestead of said Fuller.

No further business appearing, on motion duly seconded, the Board adjourned.

R. KOEHLER,
2nd Vice President.

GEO. H. ANDREWS, *Secretary*.

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OFFICE OF THE OREGON AND
CALIFORNIA RAILROAD COMPANY,
PORTLAND, OREGON, April 14, 1891.

Pursuant to Article XVII of the By Laws and of notice duly published in the "Daily Oregonian", a newspaper issued and published at Portland, Oregon, from March 14th, to April 14th, both days inclusive, in words and figures as follows, to-wit:

"Oregon & California Railroad Company—Notice of stockholders' meeting—Stockholders are hereby notified that the annual meeting of the stockholders of this company will be held at the office of the company, corner of F and Front streets, in the city of Portland, county of Multnomah, state of Oregon, on Tuesday, the 14th day of April next, at 11 o'clock A. M., for the purpose of electing directors for the ensuing year, filing supplementary articles of incorporation, and such other business as may legally come before the meeting.

GEO. H. ANDREWS *Secretary*.

Portland, Or., March 13, 1891."

the stockholders met at the office of the Company, Portland, Oregon, this day at 11 o'clock A. M.

Second Vice President R. Koehler, Acting as President, called the meeting to order. Geo. H. Andrews, Secretary, present.

The Secretary presented the following certified list of stockholders, entitled to vote at the meeting, viz:

368	Name of stockholder.	Shares of stock.	
		Preferred.	Common.
	Henry Villard, Reorganization Trustee.....	390	120
	Chas. E. Bretherton, do.	320	190
	R. D. Peebles, do.	315	675
	H. Villard.....	..	20
	R. D. Peebles.....	..	20
	Pacific Improvement Company.....	118,895	68,960
	R. P. Earhart.....	..	5
	Donald Macleay.....	..	5
	John McCracken.....	..	5
	R. Koehler.....	15	..
	W. W. Bretherton.....	5	..
	Geo. H. Andrews.....	5	..
	Leland Stanford.....	5	..

C. P. Huntington.....	5	..
Chas. F. Crocker.....	5	..
Timothy Hopkins.....	5	..
W. V. Huntington.....	5	..
E. H. Pardee.....	30	..
Total	120,000	70,000

I hereby certify the foregoing to be a complete list of the stockholders of the *stockholders of the Oregon and California Railroad Company* of record and entitled to vote at the annual meeting of the stockholders of said Company to be held April 14th, 1891.

GEO. H. ANDREWS, *Secretary*.

369 On the roll being called the following stockholders were present in person or by proxy, viz:

	Shares of stock.	
	Preferred.	Common.
W. W. Bretherton.....	5	..
Pacific Improvement Co., by R. Koehler, Proxy..	118,895	68,960
R. P. Earhart.....	..	5
Donald Macleay.....	..	5
R. Koehler.....	15	..
Geo. H. Andrews.....	5	..
Total shares present and represented.....	118,920	68,970

The minutes of the last annual meeting of the stockholders were read and approved.

On motion of Donald Macleay, seconded by R. P. Earhart, the following resolution was unanimously adopted by a vote of all the stock present, being more than three fo-rths of the capital stock of this Company issued and outstanding, viz:

Resolved by the Stock-holders of the Oregon & California Railroad Company that supplemental articles of incorporation be adopted and filed by this company in addition to the present articles of incorporation for the purpose of engaging in the new enterprises or business pursuits hereinafter specified in addition to the enterprises described in the original articles and the supplementary articles of

370 incorporation heretofore filed, in such manner and with the like effect as if there were inserted at the end of the tenth subdivision of article Three (3) of the original articles as amended by the said supplemental articles heretofore adopted and filed, the following provisions.

Eleventh. To purchase, construct, equip, own and operate railroad, telegraph and telephone lines with all the necessary branches, side-tracks, fixtures, buildings, depots, stations and appurtenances from the City of Portland or the City of East Portland in Multnomah County and State of Oregon Southerly on the East Side of the Willamette River, by way of Silverton, Coberg and Springfield and the

middle fork of the Willamette River to the State boundary line between the States of Oregon and California:

Twelfth. From the City of Portland in Multnomah County, State of Oregon, Southerly on the West Side of the Willamette River to the town of Airlie in the County of Polk in said State and from thence or from a point between Monmouth and Airlie Southerly by the most practicable route to the South boundary line of the State of Oregon:

Thirteenth. With branches as follows, to-wit:

Beginning at a point at or near the town of Silverton in Marion County in said State and running in a North Westerly direction to Woodburn in said state:

From a suitable point on Howells Prairie between the towns of Silverton and Macleay South Easterly to a suitable point in the Waldo Hills:

From a suitable point opposite the town of Scio in Linn County to said town of Scio:

From, at or near Broadmeads in Yamhill County in
371 a Westerly direction to the town of Sheridan in said County:

From a suitable point or points on the line on the West Side of the Willamette River near Dayton, Yamhill County to said town of Dayton, and all such other necessary branches as it may from time to time construct, purchase or otherwise acquire.

And to maintain and operate such railroad, telegraph and telephone lines and to carry passengers and freight on said railroad lines and receive tolls therefor.

Fourteenth. To purchase or otherwise acquire, lease or hold any railroad or railways, telegraph or telephone lines between said points described or any of them already constructed or being constructed and to purchase, hold and acquire the Railways known as the Oregonian Railroad Company's and the Portland and Willamette Valley Railway Company's lines with all their side-tracks, rolling stock, depots, stations, warehouses and all the real and personal property of every kind and description of the said Oregonian Railroad Company and said Portland and Willamette Valley Railway Company situated in the State of Oregon or elsewhere and to operate and maintain such Railways and to carry passengers and freight thereon and to receive tolls therefor.

Fifteenth. To purchase or acquire lands or lots whether adjacent or contiguous to its railroad or not and to hold, possess, lease, mortgage or otherwise dispose of said lands as may be deemed fit.

Sixteenth. To do all other things convenient, necessary or proper to be done for accomplishing or carrying out any or all the objects or enterprises above specified.

372 And that the Board of Directors of this Company be and they are hereby authorized and directed to adopt, execute and file for and on behalf of this Company the supplementary articles of incorporation above set forth."

On motion of R. P. Earhart seconded by W. W. Bretherton it was resolved that the meeting proceed to the election of eleven Directors to serve for the ensuing year.

The Chairman appointed W. W. Bretherton Teller.
 The vote was by open ballot and resulted as follows:
 E. H. Pardee, received 187,890 votes.
 C. P. Huntington, received 187,890 votes.
 W. V. Huntington, received 187,890 votes.
 Chas. F. Crocker, received 187,890 votes.
 Timothy Hopkins, received 187,890 votes.
 R. Koehler, received 187,890 votes.
 R. P. Earhart, received 187,890 votes.
 John McCracken, received 187,890 votes.
 Donald Macleay, received 187,890 votes.
 W. W. Bretherton, received 187,890 votes.
 Geo. H. Andrews, received 187,890 votes.

Each of the above stockholders having received 187,890 votes, being all the vote cast and more than a majority of the capital stock present, the chairman then declared them duly elected as Directors of this Company for the ensuing year and until their successors are elected and qualified and filed with the Secretary the following certificate of election.

373 STATE OF OREGON,
County of Multnomah, ss:

I, Richard Koehler, Second Vice President of the Oregon & California Railroad Company and Chairman of the Annual Meeting of the Stockholders of said Company do hereby certify that at the Annual Meeting of the Stockholders of said Company duly called and held at the office of the Company in the City of Portland, in the State of Oregon, on the 14th day of April, 1891, the following named persons, Stockholders of the Company, were duly elected Directors of the Oregon & California Railroad Company to serve for the ensuing year and until their successors are duly elected and qualified to-wit: E. H. Pardee; C. P. Huntington; W. V. Huntington; Chas. F. Crocker; Timothy Hopkins; R. Koehler; Donald Macleay; John McCracken; R. P. Earhart, W. W. Bretherton and Geo. H. Andrews.

R. KOEHLER,
*2nd Vice President and Acting President
 and Chairman of the Stockholders
 Meeting.*

Portland, Oregon, April 14th, 1891.

On motion of R. P. Earhart seconded by W. W. Bretherton, the meeting adjourned until Monday, May 4th next at 11 o'clock A. M.

R. KOEHLER,
2nd Vice President and Chairman.

GEO. H. ANDREWS, *Secretary.*

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OFFICE OF THE OREGON AND
CALIFORNIA RAILROAD COMPANY,
PORTLAND, OREGON, August 21st, 1893.

Pursuant to Article XIV of the By Laws a regular meeting of the Board of Directors of this Company was held at the office of the Company, Portland, Oregon this day at 11 o'clock A. M.

Present:

2nd Vice President and Director R. Koehler, Directors J. McCracken, L. R. Fields, W. A. Grondahl and Geo. H. Andrews and Assistant Secretary C. G. Sutherland.

The minutes of the last regular meeting of the Board and of the adjourned meeting thereof were read and approved.

On motion of Director J. McCracken, seconded by Director L. R. Fields, the resignation of Mr. Edward H. Pardee as Secretary of this Company was accepted.

On motion of Director L. R. Fields seconded by Director J. McCracken, Mr. Geo. H. Andrews, was appointed Secretary of this Company vice Pardee resigned.

On motion of Director J. McCracken seconded by Director Geo. H. Andrews, the resignation of Mr. Curtis G. Sutherland as Assistant Secretary of the Company was accepted.

On motion of Director J. McCracken seconded by Director L. R. Fields, Mr. I. E. Gates, was appointed Assistant Secretary of this Company vice Sutherland resigned.

On motion of Director L. R. Fields seconded by Director J. McCracken, the following preamble and resolution were unanimously adopted, viz:

Whereas, It is desirable that the leases heretofore executed by this Company to the Southern Pacific Company should be in some respects modified; And

Whereas, It is also desirable that all the railroads now belonging to this Company should be leased to the Southern Pacific Company;

Therefore be it resolved, That the 2nd Vice President and the Secretary of this Company be and they are hereby authorized, empowered and directed on behalf of this Company, to make and execute under the seal of this Company, an agreement with the Southern Pacific Company, which said agreement shall take effect as though executed on August 1st, 1893, and be in the following form, viz:

376 Agreement made and entered into this first day of August, 1893, by and between the Oregon and California Railroad Company, a corporation created, organized and existing under the laws of the State of Oregon, of the first part, and the Southern Pacific Company, a corporation created, organized and existing under the laws of the State of Kentucky, of the second part.

Whereas, the railroads of the party of the first part (other than those recently acquired as hereinafter stated) have been held by

the party of the second part under lease from the party of the first part, dated July 1, 1887, and the modifications of such lease dated November 20, 1890, and under lease dated December 5, 1890, respectively, and

Whereas, the party of the first part has recently acquired the railroad formerly known as the Portland and Yamhill Railroad, and the Oregonian Railroad, (West Side) respectively, being the railroads extending from Portland to Dundee and from Dundee to Airlie and Sheridan Junction to Sheridan, which said railroads have also been held by the Southern Pacific Company under leases dated August 26, 1892, and December 5, 1890, respectively, and

Whereas, upon consideration thereof it has been determined to be advisable for all parties that all the railroads now belonging to the party of the first part should be leased to the party of the second part under one instrument of lease, upon terms and conditions somewhat different in certain respects from those embodied in such former leases.

377 Now therefore, This instrument witnesseth:

That in consideration of the premises and the mutual undertakings, covenants and agreements hereinafter expressed, the parties hereto have undertaken, covenanted and agreed, and hereby undertake, covenant and agree to and with each other as follows, that is to say:

First. The parties hereto, under even date herewith, and simultaneously with the execution hereof, have executed an agreement of lease to the party of the second part of the railroads now belonging to the party of the first part, as by said agreement of lease, reference thereto being had, will more fully appear.

Second. All accounts between the parties hereto in respect to transactions prior to the day of the date hereof or in any wise arising from or growing out of the heretofore existing leases of the various railroads hereinbefore referred to, or the possession, use or operation of said railroads by the said party of the second part thereunder, are to be settled and adjusted according to the terms and provisions of such former leases; but otherwise the said agreement of lease executed simultaneously herewith is hereby substituted for and instead of said formerly existing leases.

Third. The party of the first part will repay to the party of the second part such expenses as may have been in any wise incurred by it in or about or in connection with the improvement or betterment of the line of railroad known as the Oregonian Railroad,
378 (West Side) since the lease of said railroad to the party of the second part on the fifth day of December, 1890, or in or about standard-gauging the said railroad.

In witness whereof, the party of the first part has caused these presents to be signed by its Second Vice President and Secretary, and the party of the second part has caused these presents to be

signed by its President and Secretary, and both parties have caused their respective corporate seals to be hereunto affixed.

THE OREGON & CALIFORNIA RAILROAD COMPANY.

By ———, *Second Vice President.*

THE OREGON & CALIFORNIA RAILROAD COMPANY,

By ———, *Secretary.*

In presence of:

SOUTHERN PACIFIC COMPANY,

By ———, *President.*

SOUTHERN PACIFIC COMPANY,

By ———, *Secretary.*

In presence of:

379 Assent of the Preferred Stockholders of the Oregon and California Railroad Company to the Foregoing Agreement.

We, the undersigned, holders of the number of shares of the preferred stock of the Oregon and California Railroad Company set opposite our names, which said number of shares is an absolute majority in amount of all the preferred stock of said Company actually issued and outstanding, do hereby consent to, ratify and approve the execution of the foregoing instrument in manner and form as therein set out.

Names.

Number of shares.

Assent of Trustees for the Holders of the Preferred Stock of the Oregon and California Railroad Company to the Foregoing Agreement.

We, S. T. Gage, M. T. Smith, and W. E. Brown, Trustees for the Holders of the preferred stock of the Oregon and California Railroad Company, hereby consent to and approve the execution of the foregoing instrument in manner and form as therein set out.

380 On motion of Director J. McCracken seconded by Director L. R. Fields, the following preamble and resolutions were unanimously adopted, viz:

Whereas, It is desirable that all leases heretofore executed by this Company to the Southern Pacific Company should be modified somewhat and changed in certain respect, and

Whereas, It is also desirable that all the railroads now belonging to this Company in the state of Oregon should be leased to the said Southern Pacific Company by one duly executed indenture of lease.

Therefore be it resolved, That the Second Vice President and the Secretary of this Company be and they are hereby authorized, em-

powered and directed, on behalf of this Company to make and execute under the seal of this Company to the Southern Pacific Company, and with the consent of the holders of a majority of the preferred stock, and Indenture of Lease, which lease shall take effect as though executed on August 1st, 1893, and be in the following form:

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Sec'y Ctf. 729. O. & C. R. R. Co.

Oregon and California R. R. Co. and Southern Pacific Company.

Lease.

Dated August 1st, 1893.

Filed with #646.

This Indenture, made and entered into this first day of August, eighteen hundred and ninety-three, by and between The Oregon and California Railroad Company, a corporation existing under the laws of the State of Oregon, party of the first part, and the Southern Pacific Company, a corporation existing under the laws of the State of Kentucky, party of the second part,

Witnesseth:

First. The party of the first party hereby leases to the party of the second part, for the period of thirty-four years from and including the date hereof, the railroads of the party of the first part in the State of Oregon, and also all the equipments and appurtenances of every kind and nature whatsoever thereto respectively belonging or appertaining.

Second. The party of the second part will pay to the party of the first part a fixed yearly rental for the premises so leased, amounting to the sum of five thousand dollars per annum, which rental shall be paid in four equal instalments of twelve hundred and fifty dollars each on the first days of February, May, August and November of each year during the pendency of this lease, (commencing on the first day of November, eighteen hundred and ninety-three) it being understood and agreed that the amount of such rental, so far as requisite, shall be appropriated and applied by the party of the first part to the expenses of maintaining and keeping up its corporate organization under the laws of the State of Oregon.

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Third. The party of the second part is to operate the said leased railroads belonging to the party of the first part and shall, in the first place, out of the earnings and income derived therefrom, pay the cost of operating such railroads and the incidental expenses connected therewith, and likewise pay the taxes and assessments on the said demised premises, the cost of insurance thereof if and so far as affected, such amounts as it may become necessary to pay for damages to persons and property incurred in the course of operating the said leased railroads, or on account of

land purchases heretofore made by or on behalf of said party of the first part, and the expenses of repairing, maintaining, improving, adding to and keeping up the said leased railroads, with all their appurtenances, and of maintaining, providing and keeping up in suitable condition and repair rolling stock and equipment for carrying on as economically and profitably as may be the transportation business of said leased railroads, and so far as the same shall not be paid from rentals or income or proceeds of sale of lands, and the expenses of and connected with the lands of said party of the first part, and perfecting the title thereto, and payment of taxes and assessments thereon, and the expenses of and connected with its land department; and after the payments and deductions aforesaid, the said lessee shall apply the residue of the amount of the net income and earnings of said railroads, to such extent as shall be required for the purpose, to the payment of the interest and any sinking fund contributions from time to time becoming due and payable during the existence of this lease upon the now existing bonded indebtedness of the party of the first part, and such other bonded indebtedness of said party of the first part as may be created by said party of the first part with the assent of the party of the second part hereto.

383 And it is further provided and agreed, by and between the parties hereto, that on the first day of May, in each year during the continuance of this lease, the party of the second part shall pay to the party of the first part such balance, if any, of the net earnings or income received by the party of the second part from the said leased premises, with the appurtenances, for the year ending on the 31st day of December then next preceding, as shall remain in its hands after all the payments, expenses, deductions and advances and all the payments for interest and sinking fund contributions hereinbefore provided for or agreed or directed to be made, are paid. Provided however, that if at the time viz: such 1st day of May when such balance of such income or rental is provided to be paid to the party of the first part, there shall be any sum due or owing from the party of the first part to the party of the second part, for or in respect of advances or payments theretofore made by the party of the second part, or for new additions or improvements to the demised premises, or any part thereof, or for expenses of keeping up the corporate organization of the party of the first part, or maintaining agencies for the transfer of its stock and bonds, or for any expenses of its business or affairs, or for or in respect of any other sums which may have been lawfully advanced or paid by the lessee to or for the party of the first part, the party of the second part shall be entitled to retain and pay to itself whatever may be owing to it from the party of the first part for or in respect of any of the causes, or matters or considerations aforesaid, including any interest which may be due or owing from the party of the first part to the party of the second part thereon. And provided further, that if such

384 balance of net earnings or income received by the party of the second part from the said leased premises, with the appurtenances, for any year, and which by the foregoing provisions

hereof would be and become payable by said party of the second part to said party of the first part, shall exceed the amount of seven per cent per annum upon the par value of the then existing preferred stock of the party of the first part, and six per cent upon the par value of the then existing common stock of said party of the first part, then and in that event the said party of the second part shall be entitled to and shall retain to itself for its own use any and all excess of such balance of net earnings and income over and above the amount of seven per cent per annum upon the par value of the then existing preferred stock, and six per cent per annum upon the par value of such then existing common stock of the party of the first part.

Fourth. It is further understood and agreed between the parties hereto that at the time when this lease shall go into operation, the party of the second part shall receive and be entitled to use and apply in the operations of the said demised premises, all fuel, rails and materials and supplies which shall then be on hand belonging to the party of the first part; and likewise to collect and receive all sums which may be at that time due and owing to the party of the first part for freights and passage money, including all sums in the hands of agents or employees, or due from connecting roads, and likewise that the sums that may at such time be due or owing by the party of the first part for back wages of employees, and for fuel, rails, and other materials and supplies for the business of said demised premises, or to connecting roads, or damages to persons or property in the operation of the road, or for other incidental expenses of the party of the first part, shall be paid by the party of the second part, and all the receipts and payments for and on account of such back freights and passage money and moneys in the hands of agents, employees or connecting roads, and for such back wages and debts for fuel, rails and other materials and supplies, and to connecting roads, and for damage to persons and property, and incidental expenses as aforesaid, shall be brought into and form part of the accounts of the party of the first part with the party of the second part hereunder for the year ending December 31st, 1893, in like manner and with like effect in all respects as if the same had accrued during that year.

Fifth. In case the amount of net earnings or income of the said demised premises applicable under the preceding provisions hereof to the payment of the current interest upon the bonded indebtedness of the party of the first part shall be insufficient in any year to pay in full such current interest for the year, it shall be optional with the party of the second part whether or not to advance or pay for account of the party of the first part the amount of such deficiency, and if the party of the second part shall advance or pay for account of the party of the first part such deficiency, or any part thereof, it shall be entitled to interest at the rate of six per cent per annum upon such advances or payments until reimbursed therefor, and shall be entitled to repay itself for such advances or payments and interest at any time, or from time to time, out of any subsequent

386 earnings or income of said demised premises in the manner provided by the third article hereof in that behalf, and shall have a lien therefor upon the demised premises, and the income thereof, until such advances or payments, with interest thereon, shall be reimbursed; and in case the party of the second part shall at any time, or from time to time, make any advances to or for the party of the first part, for new additions or improvements of the demised premises, or any part thereof, or for the necessary expenses of keeping up the corporate organization of the party of the first part, or maintaining agencies for transfer of its stocks and bonds, or for other incidental expenses not paid by the party of the second part under the lease, or for any other object or purpose, the party of the second part shall be entitled to receive interest upon all such advances at the rate of six per cent per annum from the making until the reimbursement thereof, and the party of the second part shall have a lien for such advances, and the interest thereon, upon the said demised premises and the income thereof until such advances are reimbursed, with interest, and the party of the second part shall be entitled at any time, and from time to time, to refund to itself such advances and interest out of any earnings or income of the demised premises which may be in its hands, unless it shall have been expressly agreed between the parties hereto to the contrary in writing at or before the making of such advances.

Sixth. The party of the second part will, when thereunto requested so to do by the party of the first part, guarantee the payment of the principal and interest of all bonds of the party of the first part which may have been, or may hereafter be issued under mortgage from the party of the first part to the Union Trust
387 Company of New York, dated July 1, 1887, such guaranty to be substantially in the form following, viz:

"For value received, the Southern Pacific Company hereby guarantees the punctual payment of the principal of and interest upon this bond as therein provided, and agrees that the mortgage given to secure its payment shall have priority of lien upon the mortgaged property over its lien and claims thereon as lessee of the Oregon and California Railroad.

In witness whereof, the corporate seal of the said Southern Pacific Company is hereto affixed and attested by its Treasurer by order of the Board of Directors this thirty-first day of December, 1887.

Attest:

— — —, *Treasurer.*

Seventh. This indenture may be at any time modified in any of its terms or provisions or cancelled by agreement of the parties hereto.

In witness whereof, the party of the first part has caused these presents to be signed by its Second Vice President and Secretary, and the party of the second part has caused these presents to be

signed by its Vice President and Secretary, and both parties have caused their respective corporate seals to be hereunto affixed.

THE OREGON & CALIFORNIA RAIL-
ROAD CO.,

By ———, *Second Vice-President.*

THE OREGON & CALIFORNIA RAIL-
ROAD CO.,

388 [SEAL.]

By ———, *Secretary.*

SOUTHERN PACIFIC COMPANY,

By ———, *President.*

SOUTHERN PACIFIC COMPANY,

By ———, *Secretary.*

In presence of:

———

Assent of the Preferred Stockholders of the Oregon and California Railroad Company to the Foregoing Agreement.

We, the undersigned, holders of the number of shares of the preferred stock of the Oregon and California Railroad Company set opposite our names, which said number of shares is an absolute majority in amount of all the preferred stock of said Company actually issued and outstanding, do hereby consent to, ratify and approve the execution of the foregoing instrument in manner and form as therein set out.

Names.

Number of Shares.

———

———

389 *Assent of Trustees for the Holders of the Preferred Stock of the Oregon and California Railroad Company to the Foregoing Agreement.*

We, S. T. Gage, N. T. Smith, and W. E. Brown, Trustees for the Holders of the preferred stock of the Oregon and California Railroad Company, hereby consent to and approve the execution of the foregoing instrument in manner and form as therein set out.

———
———
———

390 Be it further resolved, That upon the acceptance of said lease by the said Southern Pacific Company, the same shall be considered and treated as having been duly executed on the first day of August, 1893.

On motion of Director John McCracken, seconded by Director L. R. Fields, the following preamble and resolution were unanimously adopted:

Whereas, By resolution of this Board passed February 7th, 1891, a deed was ordered executed in favor of Carlos Little for S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ Section 23, Township 2 South Range 6 West, and whereas, Carlos Little has since assigned his interest in said land and his assignees demand a deed for said land;

Resolved, That the 2nd Vice President and the Secretary of this Company be and they are hereby authorized to execute in the name of this company a deed in the usual form to all the interest of this company to O. S. Boyles and W. B. Williams as assignees of contract No. 1250 made in favor of Carlos Little to the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ Section 23, Township 2 South of Range 6 West, and that the deed executed by this Company February 28th, 1891 in favor of Carlos Little be and the same is hereby cancelled.

No further business appearing, on motion duly seconded the Board adjourned.

R. KOEHLER,
2nd Vice President.

GEO. H. ANDREWS,
Secretary.

391 S. GRUTZE, a witness called on behalf of complainant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Grutze, you were Deputy Auditor of the city of Portland on May 1, 1907, and have been such Deputy Auditor for a great many years, and are now such Auditor?

A. Yes.

Q. I show you copy of an instrument which is set up in paragraph 8 of the complaint in this suit and which reads as follows:

"To the Honorable Mayor and Common Council of the City of Portland:

The Oregon and California Railroad and the Southern Pacific Company, lessee, as the successors in interest in possession of all the rights, franchises and privileges created and conferred by ordinance No. 599 passed and approved January 6, 1869, granting to the Oregon Central Railroad Company certain rights on Fourth Street in the City of Portland, to which rights reference is hereby made, do hereby respectively protest against the passage of Ordinance No. 16491 upon the following ground, *as*: That the said proposed ordinance is unreasonable and invalid, but particularly because it is not within the power of the common council to repeal, amend or modify said ordinance No. 599.

OREGON AND CALIFORNIA RAILROAD
COMPANY,

By J. P. O'BRIEN, *Its Second Vice President.*

SOUTHERN PACIFIC COMPANY,

By J. P. O'BRIEN, *General Manager.*

Dated May 1, 1907."

and will ask you if you recall the circumstances of the pendency of this ordinance known as No. 16491 entitled "An ordinance prohibiting the operation of steam locomotives and freight cars
392 on Fourth street between G Street and the southern limits of the city of Portland, and bearing—it apparently was passed on the 1st day of May, 1907, and afterwards became a law without the signature of the Mayor. Do you recall the circumstances?

A. I recall the ordinance, yes sir.

Q. You recall a communication having been received at that time before the ordinance was passed of the tenor and effect that I have read to you from paragraph 8?

A. The records of the council show that there was a communication read in the council relative to that matter and it was referred to the committee on Judiciary and Elections on that date.

Q. Does it show from whom the communication was received? Was it received from the Oregon and California and the Southern Pacific Company?

A. I could not say without consulting the records again. I could not say whether it was from that company or not.

Q. Do you know as a fact that it — from the Southern Pacific Company? Do you remember now that it was?

A. No, I could not say definitely that it was without consulting the records.

Q. Well, was it a communication in favor of the ordinance or against it, as you remember?

A. I would have to consult the records to say.

Q. Do you remember, Mr. Grutze, that I presented this matter on behalf of these companies, delivered the original to you on the morning before the council met on that day and that it was read and no attention was paid to it, and the council voted and passed the ordinance of May 1, 1907?

A. No, I can't say that I remember your giving it to me,
393 Mr. Fenton, because so many records are given to me by different ones I could not testify.

Q. Were you—how is that record kept of the proceedings. How do you do that?

A. The record—when the communication was presented to the council—afterwards it is written up by the typewriter, states the communication, generally states from whom, and in a short—as few words as possible states what it was; then it recites the disposition of it; whatever committee referred to.

Q. If it was not referred at all—if the council was then in session you would have a record of the vote would you?

A. No, it would hardly be voted on—a communication.

Q. I know, but the ordinance was passed May 1st.

A. Yes.

Q. And the notice was dated May 1st.

A. Yes.

Q. They must have been received together and acted upon if

any action was taken. Will your records show what was done on May 1st?

A. It was referred to the committee on Judiciary and Elections and they referred it back.

Q. Immediately?

A. No. At a subsequent meeting, recommending that it be placed on file.

Q. But the ordinance was passed May 1st.

A. The ordinance was passed.

Q. And the communication bears date May 1st.

A. Yes.

Q. It was received before the ordinance was voted upon. Was it then referred? Could you consult your records and then—

A. My recollection was that the ordinance passed on May 1st.

Q. Yes. That is what this says.

394 A. Was it not referred to the committee and at the next meeting indefinitely postponed and another ordinance substituted?

Q. No. This is the ordinance. Will you refresh your memory by looking at the record and if you have the record bring it down?

A. Yes, I will make a copy.

Mr. FENTON: I will excuse the witness for the present.

Witness excused.

395 R. KOEHLER resumes the stand.

Direct examination continued.

Questions by Mr. FENTON:

— Recurring to your connection with these properties, how long have you known the railroad—the railroad to be operated over Fourth street where it now is from the Union Depot or the terminal south, by way of McMinnville as now? Since when, since the first time?

A. I have known that to be operated since July, 1874, and I have to do with their operation since the fall of 1876 up to 1904.

Q. I will ask you to state to the Court whether or not the Oregon and California Railroad Co. and the Southern Pacific Co., Lessee since July 1, 1887, has complied with all the ordinances of the city with reference to the improvement and repair of Fourth Street as requested or required by the city?

A. It has.

Q. Are you able to say in a general way what improvements were made upon this street in the way of improvement and repair from the time you first knew of the property up to the time—well, up to the present time, pursuant to these requirements of the common council of the city of Portland and in pursuance of Ordinance No. 599?

Objected to as incompetent and irrelevant.

Objection overruled. Exception saved.

A. Yes. In 1876 when I took charge of the property the track was laid with fifty pound iron rails over Fourth street with the planking on top and this was maintained up to 1882, when the iron rails were exchanged for steel rails of the same weight and the planking was taken off and it was then ballasted and top dressing put on, such as is now used in macadamized streets. Can I
396 refresh my memory with some memoranda?

Q. Yes, you can refresh your memory. I don't want the cost Mr. Koehler. I just want what was done.

A. No. In 1896 a part of the street was relaid with 56 pound steel rails and macadamized.

Mr. KAVANAUGH: When were the 50-pound steel rails removed?

A. 1896 over part of the street.

Mr. KAVANAUGH: 1896?

A. 1896. Yes and—did I say 56-pound rail?

Q. Yes, 56-pound steel.

Mr. KAVANAUGH: 56?

A. Yes. For a width of nine feet; I would say four and a half feet from the center the track was planked. There was laid some longitudinal planks of $2\frac{1}{2}$ inches and on top thereof there was laid cross planks which were called wearing planks, of $1\frac{1}{2}$ inch dressed and beveled and the rest of the street was paved with wood block pavement, of which we had to share our portion as we had to maintain the street for 12 foot width, that is to say, 6 feet from the center each side. In 1902, that portion of the street between Jefferson, the south line of Jefferson, and the north line of Burnside street was improved by putting in a 7 inch high rail on ties and ballast underneath and planking on top of the ties; with wood paving blocks. The balance of the street so far as we had to maintain, that is, over the difference between the 9 feet and the 12 feet or $1\frac{1}{2}$ feet on each side, we improved in the same manner as the main street. The remaining width of the street was improved by concrete foundation and wooden blocks and carbolineum avenarius. There were a few minor improvements and changes made at a later period between—about 1904, of which I really have no

397 knowledge, as I had then given up the management of the road. It merely came to my observation, but will say changes were made in some of those street car crossings by putting in more substantial crossings in lieu of those which had been in before.

Q. Now where did Fourth street end as covered by the ordinance No. 599. What street on the south.

Mr. KAVANAUGH: It shows for itself as Glisan.

Q. No it don't for itself, on the south. And in that connection I call your attention to Plaintiff's Exhibit A and ask if you can say from that where Fourth street ended under ordinance 599 on January 6, 1869.

A. It ended on the south side of Sheridan Street.

Q. I call your attention to this map, to Plaintiff's Exhibit A marked in red from Sheridan street south, and would ask you what

that represents and what the fact is as to the ownership of that right of way.

A. The railroad line from the south side of Sheridan Street southward runs through private property and the railroad company acquired its right of way over it from various private parties. I myself during the time I had charge of the property virtually acquired all of this here.

Q. In red?

A. In red, including these things here.

Q. Including these blocks marked in red, written in?

A. Yes.

Q. How does it come that the streets apparently south of Sheridan are open through and in many instances cross over the right of way that was thus acquired by the company as private property—private right of way?

A. Those additions to the street——

Q. —to the street?

398 A. To the city had apparently been laid out before the line was built. There was quite a large amount of property here which belonged to the South Portland Real Estate Association from which we acquired, for instance, this right of way beyond the extension of Fourth street and over several blocks which I cannot now identify. Others of these blocks have been sold to private parties, and when I came in 1876 and found—a little bit later we found that there were no deeds to this property and while there was a vague idea that the company had acquired a right of way by agreement no deeds could be found and we had to settle with the owners.

Q. You obtained deeds to all the property then from Sheridan street south to Bertha?

A. Yes.

Q. I call your attention to the fact that the extension of Fourth street beyond Sheridan street there in red does not show any street south of Sheridan street until you get to Hooker street, where apparently there is a Fourth street. Is it true that there is no street between Sheridan and Hooker on Fourth street? Is that open now?

A. There is no street here.

Q. Are blocks occupied on either side by private property?

A. Yes.

Q. And a way left open?

A. Yes, and very largely covered by that large trestle work over Marquam Gulch.

Q. Then where that gulch——

A. So that the houses are way below the railroad track.

Q. So that the trestle then stands upon the right of way acquired by purchase?

A. Yes.

399 Q. And is private property of the company. I will ask you to look at this Exhibit "A" and ask you to state whether or not that was a fairly correct representation of the location of the city both east and west side of the river and of the various

streets, bridges and of the line of railroad from the terminals on Fourth street southerly.

A. It is.

Q. I will ask you to state, Mr. Koehler, whether or not there is any other way to bring the business of the Oregon and California Railroad Company into the Union Depot or into Portland proper excepting over the Fourth street line at present.

A. You mean on the West Side line?

Q. Yes.

A. No, there is no other way at present.

Q. What is the fact, if you know, as to where the terminals known as the Northern Pacific Terminal Company are situated with reference to the north end of Fourth street?

A. That is adjoining the north end of Fourth street, in fact a part of Fourth street, or was Fourth street, is now part of the depot grounds. You see they have vacated the streets.

Q. When was it the city of Portland vacated the north end of Fourth street so as to provide a terminal for this railway and other railways to get into the terminal?

A. I think about the year 1882.

Mr. KAVANAUGH: I object to that. There is record of that.

Mr. FENTON: I want to prove it and will then offer the ordinance.

Q. What was the purpose of that?

A. To enable the Terminal Company, the Northern Pacific Terminal Company, to utilize the ground which they had acquired at the end of Fourth street, large areas, in a proper manner for 400 terminals.

Q. What is the fact as to the relation of the Oregon and California Railroad Company at the time of this vacation and the Southern Pacific Company, lessee, to the Northern Pacific Terminal Company?

A. The Oregon and California Company and the Southern Pacific Company as its lessee of this property were interested in the Terminal Company by holding part of the stock.

Q. Now, I will ask you to state to the Court whether or not this Fourth street line was to be used and operated on Fourth street in connection with the vacation of that portion of the street in connection with these terminal grounds.

A. It was.

Mr. KAVANAUGH: Objected to.

Objection overruled. Exception saved.

Q. Do you remember when that was, about?

A. I think about 1883.

Mr. FENTON: I don't think those matters are completed in the initial application.

Q. Now, I will ask you to state to the Court if you have examined a memorandum of date November 3, 1909, from General Manager, J. P. O'Brien with reference to the expenditures on this piece of track from the extension of Fourth street at the north end to Sheri-

dan street and covered by ordinance No. 599 and whether or not you have checked up these figures with your estimate of the cost of these various improvements, construction and maintenance of this road over this mileage and if you base your estimates from your knowledge——

Mr. KAVANAUGH: If the Court please, his form of question running the witness along this way, and stating everything—all he has to do is to answer yes or no, I have to object to it.

401 Q. I will ask upon what you based your estimate; that is the question.

A. I have seen the statement and have checked up these figures and I find them substantially correct. I have figured for myself and instead of the grand total of \$167,283.00 I come to about \$160,000.00 in rough figures as representing the cost of the road on Fourth street, being various improvements which I have enumerated and the cost of maintenance of the track and of the roadway during the periods therein mentioned.

Q. Have you based this estimate on the knowledge which you possess as an operating official and as a person having supervision of these improvements and as an officer and official who knew the cost of the iron, steel, and various material that entered into the construction of this mileage?

A. I have.

Q. Did you make a memorandum on your own account of these items?

Mr. KAVANAUGH: I still have to renew the objection and have counsel ask the question in a proper way. It has been a series of leading questions.

Court: I think they are leading myself.

Q. I would be glad if you would give me this estimate that you have made and you may refresh your memory from any memorandum that you have made.

Mr. KAVANAUGH: I object to the introduction of this as immaterial.

Court: It will be overruled, for the present at least.

Exception saved.

402 Q. I would like to have you state these estimates that you have made in recapitulation so that we can get at the figures.

A. I estimate the cost of the original line, \$23,144.

Q. This covers, as I understand, the mileage from the north end of Fourth Street?

Mr. KAVANAUGH: Let the witness tell.

A. From the north line of Glisan Street to the south line of Sheridan Street.

Q. What distance do you estimate that to cover?

A. About 34 blocks.

Q. And in mileage?

A. 1.68 miles.

Q. Now, you may go ahead.

A. I estimated the cost of maintenance from the year 1872 to 1882—ten years—\$12,310. I estimated the cost of the relaying of the track with 50 pound rails in 1882, and the work incidental thereto, at \$19,528. I estimated the cost of maintenance of the track and the roadway from 1883 to 1896, 14 years, \$32,424. I estimated the re-laying in 1896 of a part of the track from Glisan to Jefferson with 50 pound rails, and the ties, at \$13,505. I estimated the cost of the maintenance for the years 1897 to 1902 at \$20,375. I estimated the laying of the 80 pound steel, 7 inches high rails in 1902 from Jefferson to Burnside, at \$19,767. I estimated the cost of the maintenance of the track for the period, 1903 to 1905, for three years at \$7590. I added thereto for replacing the crossing between the street railways and this Fourth Street track at a figure of \$600., which I found in this letter which has just been shown to me. And I estimated the cost of maintenance from January, 1906 to September 30, 1909, a period of 3¾ years, at \$11,071, 403 making a total of \$160,314.

Q. I will ask you to state whether or not in these estimates are included the relaying—the laying of the untreated wood blocks—replacing of the untreated wood blocks with creosoted blocks, and the building or maintaining of the improvements required by this ordinance, twelve feet in width?

A. Yes.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Mr. Koehler, where did you get your estimates on this matter?

A. I made them myself.

Q. Wasn't it possible to figure as an accurate proposition without estimating?

A. Well, I think it is as accurate as I could—

Q. Didn't the records of your books show exactly what those things cost?

A. Well, the books of the company unfortunately were all burned up in the fire at San Francisco during the earthquake, they being sent down there by reason of an auditing which had been taking place here, an auditing of the company's accounts since we took charge of it in 1874.

Q. Well, was that the Southern Pacific Company's books or the Oregon & California?

A. The Oregon & California Railroad Company's books and all its account books, after the auditing had taken place here were moved to San Francisco. I suppose for the reason—subject 404 to the inspection of some other high officials.

Q. Well, what did you have access to to arrive at these estimates?

A. Nothing but my knowledge of the track and surroundings, and my knowledge of the prices and quantities constituting the elements of the calculation.

Q. Now, your knowledge of the amount and cost of the crossings and maintenance from 1906 to 1909 would have to be received second hand, would it not?

A. You might say yes. At the same time I have been along here, and I have been identified with the property.

Q. But you haven't been in the actual direction of it?

A. No, not since 1904.

Q. Where did you get your figures for your estimates for the year 1904?

A. I got it in the—by the knowledge which I have of the cost of the maintenance of the railroad track and the cost of material which enters into this maintenance and renewals and my observation in virtue of this same kind of improvements which existed at the time I was in charge.

Q. Do you charge your memory, Mr. Koehler, with the varying and fluctuating prices of materials back for a number of years, the cost of work and all that sort of thing?

A. Yes, as far as it is possible.

Q. Do you remember what the cost of iron rails was, the cost of 50 pound steel rails, were at the time that was laid?

A. Yes.

Q. You remember that distinctly?

405 A. I remember it very distinctly.

Q. You remember what it cost to lay them?

A. No, no, but I estimated that just as we estimate when we build a piece of road—a certain amount for the laying of the track etc.

Q. Do you remember what the planking cost in those early days?

A. Planking?

Q. Yes.

A. Planking?

Q. Yes.

A. Yes.

Q. What was that?

A. Yes, I think—of course, there may have been fluctuations which I—

Q. Do you remember the price you paid for that lumber?

A. For which lumber?

Q. That put down—the first planking—of which you had any knowledge there?

A. The first planking of which I had any knowledge there is—I don't know absolutely, but I remember that the price was about \$12.

Q. Do you remember what it cost to put it in place?

A. I don't—I could not remember that. As I say, that is one of the items which had to be estimated.

Q. Then you would not pretend to say that your estimates are accurate?

A. Oh, I would not say that my estimates are absolutely accurate to a cent.

Q. To a dollar?

A. No.

Q. To \$100?

A. Well, let's put it in percentage.

Q. All right.

406 A. I will say that I may be up to 10 per cent, either one way or the other. I think I am too low. I have been very careful not to go too high.

Q. So your statement here is merely an estimate?

A. It is an estimate, yes, sir.

Q. Now, Mr. Koehler, do you remember how much—that represents what has been expended by the company in laying and maintaining that track from the time when it was originally laid, to the present time?

A. I just stated, about \$160,000.

Q. That is supposed to cover the whole cost?

A. Yes, everything.

Q. How did you arrive at your calculation for the first expenditure and cost, made long before you came here?

A. The iron was there when I came. I—

Q. In making this estimate did you take into account the original contour of the street?

A. The original contour—I had to estimate on that. I mean I had to estimate what the grading might be, and it is a very rough estimate at that.

Q. During this time, covering the full period from the time when the track was first laid, until this time, do you know what, if any, amount the company, or the several companies have paid to the City of Portland for the use of that street?

Mr. FENTON: Objected to as immaterial.

Mr. KAVANAUGH: I think we may show both ways.

Court: Let him answer. I don't know that it is material.

A. For the use of the street—I don't recollect that we paid anything. I don't think that during the time I had charge of
407 the property that we paid anything for the use of the street.

Q. Have you any knowledge of the city ever getting any compensation for that ordinance which is termed a franchise here?

A. I do not.

Q. You know as a matter of fact it has not.

A. Unless it has received something during the past four or five years.

Q. Now, the ordinance provides for the improvement of the street for a certain distance on each side of the center line of the track, I believe six feet. You say that the company has always done that when the street improvements were made?

A. Yes.

Q. Do you know whether the company did that when the improvement was made with wood blocks treated with carbonlineum avenarius?

A. I think, yes, sir.

Q. They paid for 12 feet?

A. Paid for it.

Q. You have personal knowledge of that?

A. I remember distinctly.

Q. That was improved after your connection had ceased?

A. Oh, no.

Q. You have pretty general knowledge of the equipment of the road during the time you were connected with it?

A. Yes.

Q. And at the time you took charge of the road, the original engines were then in use, were they not?

408 A. Yes.

Q. What was the weight of the original engines?

Mr. FENTON: Hardly cross examination, but I have no objection.

A. I think a few of the passenger engines they had weighed about something like 28 tons.

Q. 28 tons?

A. 28 tons, that is, 56,000 pounds.

Q. And what did the freight?

A. Well, they had one old fashioned freight engine, the "General Stevens." It was somewhat heavy—probably weighed something like 32 tons.

Q. The small engines that are used for assisting the others up and down the grades—what will they weigh?

A. About the same. You speak of those early times?

Q. Yes.

A. About the same.

Q. What do the engines weigh now—that are used for the passenger traffic.

A. They will weigh about 47 tons.

Q. Won't they weigh over 100,000 pounds?

A. No, not these engines which I received just a few days ago, going on the passenger division.

Q. How are the freight engines?

A. Well, they may weigh—I really did not notice recently what engines they are using—they may weigh something over 100,000 pounds.

Q. What is the relative size of the passenger coaches now used, with the coaches originally used on the traffic?

A. I would say the largest passenger coaches—the original passenger coaches weighed about 18 to 20 tons. The present
409 modern passenger coach weighs about 50 tons.

Q. What are the relative sizes and weight of the freight cars in that time?

A. The original freight cars used by the road weighed about 10 tons. The modern freight cars, of which a great many come over the road, now weigh about 50 tons. I speak now of the capacity of the freight cars. That is not the weight.

Q. But they are larger in proportion to their increased capacity?

A. Yes.

Q. And of much stronger build?

A. Heavier build.

Q. Weigh more?

- A. They do weigh more.
- Q. About the same relative weight?
- A. Well, a loaded—a ten ton car—the car weighed about eight tons. A modern 50 ton car weighs about 18 tons.
- Q. A little more than twice as large?
- A. Yes, sir.
- Q. Do you know the grades on that track?
- A. Yes, sir.
- Q. Where is the steepest grade on that street?
- A. I think immediately beyond the City Hall, a block beyond the City Hall.
- Q. What is the grade there?
- A. Just figured out 194 feet to a mile.
- Q. What is that in percentage?
- A. It is a little bit less than four per cent.
- Q. About $3\frac{3}{4}$?
- A. About $3\frac{3}{4}$, yes.
- Q. In your experience as a railroad man, is that as easy, or is it a heavy grade?
- 410 A. A very heavy grade.
- Q. Very difficult grade, is it not?
- A. Yes, a very difficult grade.
- Q. Do you know of any heavier grades than that in the state?
- A. I don't know of any heavier grade in the state as to ratio, but I know of much heavier grades to operate because of its length and curvature.
- Q. Does curvature make a good deal of difference?
- A. Yes, in the length.
- Q. If those tracks are very slippery, and had snow upon them—a grade of the kind on Fourth Street—isn't railroad traffic on there more difficult?
- A. Not if they are wet.
- Q. Slippery doesn't make any difference?
- A. Wetness doesn't make any difference. The track is usually better than in sunny dry weather.
- Q. How is the snow?
- A. The snow is very bad.
- Q. Ever remember any getting away?
- A. Remember, I think, twice a train was partially lost control of.
- Q. Do you remember—
- A. Special circumstances then.
- Q. —do you remember—during your connection with the road, a couple of trains got away, that were loaded with cord wood?
- A. That is just what I had reference to.
- Q. Ran clear down to the depot, didn't they?
- A. No, no, no. Well, they went to the depot, of course.
- Q. Before they could be checked?
- A. No. I think one of them I saw myself, that was under
- 411 control when they came. That engine down near Stark Street.
- Q. Where did it start—where did they lose control?

A. On the grade this side of College Street in fact, the heavy grade terminates at College Street.

Q. They sounded whistles and alarm, did they?

A. They sounded the whistles, yes.

Q. Wasn't another one loaded with cord wood?

A. I think there was a second one there shortly after.

Q. I will ask you if you know whether or not—you must have been connected with the road at this time—from about the year 1899 until 1904?

Mr. FENTON: He was connected.

A. Yes, sir.

Q. You were there at the time?

A. Yes.

Q. Were there not a number of reports came into the General Superintendent's office of engineers losing control of their engines here, coming down, at least wholly, or partially?

A. No, I don't think so.

Q. Don't remember it?

A. No, I don't think that was the case—I think it would be in a very short period of time when these two cases occurred of which you speak.

Q. The engineers were badly frightened were they not—in those two cases?

A. Some of them, yes.

Q. What would be the effect if control should be lost upon that steep grade and they were unable to regain it? Would it be
412 a very great menace to the lives in the city?

A. Not unless some one was just in front of the engine, as it might move on. I don't think the cars would leave the grade.

Q. A run-a-way train is not a very dangerous thing, as a rule?

A. Not if the road is not very badly curved, you know.

Q. Only difficulty is what gets in front of it?

A. Yes, you both remember that the grade itself makes considerable noise, which calls every one's attention to it.

Q. In getting up those grades there, does it cause any vibration to adjoining buildings and offices—those freight trains?

A. I haven't noticed it particularly. I should think as much as—even a street car line will make a vibration in the building.

Q. This would make it in much larger proportion on account of being heavier?

A. Well, I think the street cars are pretty heavy.

Q. They don't bear any comparison to weight of the trains do they?

A. No, but it depends upon the speed, if we run only six miles an hour, through the city.

Q. Is steam motive power inclined to make more—

Mr. FENTON: Let him finish.

A. I have finished.

Q. Isn't steam motive power inclined to make more noise and inconvenience than electric power?

A. Well, hardly—at least, at slow speeds. I can imagine that, at a great speed——

Q. You think then that an electric line running at a great
413 speed——

Mr. FENTON: He didn't finish.

A. I can imagine at a very high speed, the reciprocating parts of an engine would make more vibration, but at low speed, I don't think it is the case.

Q. You think an electric car going along Fourth Street would stop court business in a courthouse on account of the noise?

A. No, I don't think so.

Q. Do you think it would stop the public business in the City Hall?

A. You mean with the window shut?

Q. Yes, with the windows closed?

A. No, I don't think so.

Redirect examination:

— Mr. Koehler, how wide was Fourth Street, or is Fourth Street?

A. 80 feet, except the lower portion of it is only 60 feet.

Q. Where is this 60 feet? What part of the street?

A. I think from A——

Q. Ankeny Street?

A. Ankeny Street.

Q. North?

A. North.

Q. And from Ankeny Street south it is——

A. 80 feet.

Q. Now, counsel asked you about two trains getting away on Fourth Street. I wish you would state the circumstances and reasons why those trains got away.

Mr. KAVANAUGH: He had full opportunity to do that on cross examination.

Mr. FENTON: You didn't ask him about it.

Court: He can answer.

414 A. This was at a period at which trains were still run partially equipped with air and partially by the use of hand brakes, and we had, at that time, a number of Northern Pacific flat cars in use, which were equipped with air. We had some cars ourselves equipped with air, but we still used hand brakes on some of them, and it happened that some of these cars of the Northern Pacific which were equipped with air, which therefore made it more difficult to operate by hand—they were in a part of the grade where the non-air cars were. That made it pretty difficult for the engineer, and besides that, the engineer who was then employed on the road, was a comparatively young engineer, by reason of he having the right to bid for this run. After these things had happened we raised the pay of the man on what is called the hill engine, with the view of getting the old experienced men there without interfering with their contract rights with us, as to having the right to select

their run: In that way I think the difficulty was overcome and for this reason I don't think after the brief period there was any more trouble with these cars.

Q. When was that that these two trains——

A. I could not recollect the time.

Q. Was there anybody hurt any by reason of it?

A. No.

Q. Train run off the track?

A. No.

Q. Run into anybody?

A. No.

Q. No damage to rolling stock?

A. No.

Q. Train run into the station below?

A. No.

Q. Well, was it stopped?

A. It was brought under control when it got to the lower portion of the grade.

415 Recross-examination:

Mr. KAVANAUGH: I would like permission to ask him one more question.

Q. Do you stop and take on and let off passengers at any place along the street other than the depot?

A. No, we have one station here in the——somewhere in the center of the business part. At the present time I think it is Stark Street.

Q. You stop your cars then on Stark Street, do you?

A. Yes.

Q. Chamber of Commerce Building there?

A. Yes.

Q. Every passenger train both ways stops there for some time?

A. Yes.

Q. That train extends across Stark Street when it stops?

A. Yes, it does.

Q. Blocks the street while it stands?

A. Yes, sir.

Redirect examination:

Q. I wish to ask one further question. I want to offer this record testimony, your Honor, and Mr. Koehler is able to identify the signature. I show you what purports to be the original deed of date October 6, 1880, executed by the Oregon Central Railroad Company to the Oregon & California Railroad Company.

Mr. KAVANAUGH: I did not catch that.

Mr. FENTON: The original deed October 6, 1880.

Q. And will ask if you recognize the signature- of the parties to that instrument as—do you know the signatures of the parties to that instrument?

A. I do.

416 Q. And are they the signatures of the various officers they purport to be?

A. They are.

Q. And one of these signatures I note, is yourself, R. Koehler.

A. Yes.

Q. Were you present when this instrument was signed?

A. I was.

Q. And was it executed at that time by the parties, October 6, 1880?

A. Yes, sir.

Q. Mr. FENTON: Have you any objection to my offering that, without calling further witnesses—Mr. Dolph is dead. Mr. Bretherton is living.

Mr. KAVANAUGH: Was he a witness?

Mr. FENTON: The instrument is acknowledged and I think will be admitted without calling the attesting witnesses, but if there is any question, I will call Mr. Bretherton.

Q. I will ask you then, Charles E. Bretherton is not within the State of Oregon?

A. No.

Q. Where does he live?

A. I am informed he is at present in Los Angeles. His home is London, England.

Q. J. N. Dolph, the other witness is dead?

A. Is dead.

Q. You know that to be the signatures of these two parties?

A. Yes.

Mr. KAVANAUGH: I will object to the admission of this
417 on the ground that it is incompetent, immaterial and irrelevant, and that no authority existed for the making of that transfer, and also that the description of the property conveyed there is so utterly inadequate that it would be unintelligible.

Objection overruled. Exception saved.

Mr. KAVANAUGH: I don't object because you don't call the other witness.

Mr. FENTON: I offer this and ask leave to substitute a certified copy of this document which was recorded October 6, 1880, at Page 555 of Deed Book 42 of Records of Multnomah County, Oregon.

Q. We have the certified copy here.

Marked Complainant's Exhibit J.

Oregon Central Railroad to Oregon & California Railroad.

This indenture made and entered into this Sixth day of October on the year of our Lord one thousand eight hundred and eighty between the Oregon Central Railroad Company, of Portland, Oregon, a corporation duly incorporated and organized under the laws of the State of Oregon party of the first part and the Oregon & California Railroad Company of Portland, Oregon, a like corporation duly incorporated and organized under the laws of the State of Oregon, party of the second part.

Witnesseth: That said party of the first part the said Oregon Central Railroad Company, under pursuant to and by virtue of the power and authority conferred upon it and invested in it by the laws of the State of Oregon and pursuant to and by authority of Resolutions duly passed at a meeting of its Stock holders duly called and held at its office in Portland, Oregon on the 6th day of October, A. D. 1880, and of resolution of its Board of Directors duly passed at a meeting of said Board duly held at the office of said Company the 6th day of October, A. D. 1880, among other things authorizing the sale and conveyance of the property hereinafter described to the party of the second part and in consideration of the covenants and agreements of the party of the second part hereinafter contained and the sum of ten dollars in U. S. Gold Coin to it in hand paid by the party of the second part at and before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred, set over, enfeoffed, conveyed and confirmed and doth hereby grant, bargain, sell, assign, transfer, set over enfeoff, convey and confirm unto the said party of the second part and its successors and assigns forever, all the Railroad of the said party of the first part heretofore constructed extending from Portland, Oregon to St. Joseph in Yamhill County, in the State of Oregon a distance of forty eight miles. Together with all its lands, tenements, and hereditaments acquired and appropriated for the purpose of a right of way for its Railroad and for stations, depots, turn tables and other railroad purposes and all the appurtenances thereunto belonging.

And also all its lands, not heretofore conveyed by it acquired and which it shall hereafter acquire or to which it is entitled under and pursuant to the provisions of the Act of Congress of the United States of America entitled "An act granting lands to aid in the construction of a Railroad and Telegraph line from Portland to Astoria and McMinville in the State of Oregon" approved May fourth one thousand eight hundred and seventy.

And also all its depots, engine, houses, car houses, station houses, warehouses, machine shops, work shops, superstructures, erections and fixtures.

And also all and singular the franchises, rights and privileges now owned or possessed by it the party of the first part.

And all lands, tenements and hereditaments, acquired, appro-

priated or now owned by the party of the first part wheresoever situated.

And also all and singular the locomotives, tenders, passenger cars freight cars, and all other cars, carriages, tools, machinery
420 and equipment of said railroad now owned by the party of the first part.

And also all goods and chattels, materials and supplies now owned by the party of the first part whether in any way relating or pertaining or belonging to or connected with said railroad or running or operating the same or otherwise together with all rents, issues, incomes, profits, moneys, rights, benefits, and advantages derived or to be derived had or received therefrom by said party of the first part in any way whatever.

And all the premises, rights, franchises and property, real personal or mixed whether hereinbefore described, specified or enumerated or not, now owned by said party of the first part or to which it has any right, title or interest, legal or equitable, absolute or contingent.

To have and to hold all and singular the premises, rights, franchises and property real, personal and mixed hereby conveyed or intended to be conveyed, and every part and parcel thereof with all the appurtenances unto the same belonging or in anywise appertaining unto the said party of the second part its successors and assigns forever. And said party of the first part for itself, its successors and assigns covenants and agrees to and with said party of the second part its successors and assigns, that it the said party of the first part and its successors and assigns will and shall upon the reasonable request and at the cost of said party of the second part, its successor and assigns make, execute, or cause to be done and executed all and every such further and other lawful acts, conveyances and
assurances in law; for the better and more effectual vesting
421 and conferring the premises, rights, and franchises hereby granted or so intended to be in and to the said party of the second part, its successors and assigns forever, as by the said party of the second part, its successors and assigns or its or their counsel learned in the law shall be reasonably advised or deem necessary.

And this indenture further witnesseth, that the said party of the second part, the said Oregon and California Railroad Company in consideration of the grant and conveyance aforesaid hereby covenants and agrees to and with said party of the first part, said Oregon Central Railroad Company its successors and assigns that it said Oregon and California Railroad Company, and its successors and assigns will and shall pay and discharge or cause to be paid and discharged all the lawful indebtedness of the said Oregon Central Railroad Company and will forever indemnify and save and keep harmless said Oregon Central Railroad Company, its Directors and Stockholders against said indebtedness and from all costs, expenses and damages on account thereof.

In witness whereof, said party of the first part by virtue of said Resolution of said Meetings of its Stockholders and Board of Directors and said party of the second part, by virtue of Resolutions of its

Board of Directors duly passed have caused this Indenture to be signed by their respective Presidents and Secretaries and their respective Corporate Seals to be affixed the day and year above written.

THE OREGON CENTRAL RAILROAD
COMPANY,
By T. R. CORNELIUS, *President*.
THE OREGON CENTRAL RAILROAD
COMPANY,
By A. G. CUNNINGHAM, *Secretary*.

In presence of

J. N. DOLPH.
CHAS. E. BRETHERTON.

[Central R. R. Co. Seal.]

THE OREGON AND CALIFORNIA RAIL-
ROAD COMPANY,
By R. KOEHLER, *President*.

[California R. R. Co. Seal.]

THE OREGON AND CALIFORNIA RAIL-
ROAD COMPANY,
By A. G. CUNNINGHAM, *Secretary*.

STATE OF OREGON,
County of Multnomah, ss:

Be it remembered that on this sixth day of October A. D. 1880 before me the undersigned, a Notary Public in and for the said County of Multnomah and State of Oregon duly commissioned and qualified, personally came T. R. Cornelius, President of the Oregon Central Railroad Company and A. G. Cunningham Secretary of the Oregon Central Railroad Company whose names are subscribed to the foregoing instrument, as parties thereto and as President and Secretary of said Oregon Central Railroad Company, both personally known to me to be the individuals named and described in and who executed the said instrument, and they severally acknowledged to me that he said T. R. Cornelius as President and he the said A. G. Cunningham as Secretary of the Oregon Central Railroad Company executed the foregoing instrument as and for the acts and deeds of said Oregon Central Railroad Company freely and voluntarily and for the uses and purposes therein mentioned; and he the said A. G. Cunningham being by me duly sworn, did depose and say that he is the Secretary of the Oregon Central Railroad Company and resides at East Portland Multnomah County, Oregon, that he is the legal custodian of and is acquainted with and has in his possession the Corporate seal of the Oregon Central Railroad Company; that the seal affixed to the foregoing instrument is such corporate seal; that the same was so affixed by him as Secretary of said Company, on the sixth day of October, A. D. 1880 by order of the Board of Directors of said Company, and

that he signed his name thereto by the like order of the board of Directors of said Company.

In witness whereof, I have hereunto set my hand and affixed my official seal at the city of Portland, Oregon, the date first above written.

[NOTARIAL SEAL.]

I. R. MOORES,
Notary Public in and for Oregon.

STATE OF OREGON,

County of Multnomah, ss:

Be it remembered that on this Sixth day of October, A. D. 1880 before me the undersigned a Notary Public in and for the said County of Multnomah, and State of Oregon, duly commissioned and qualified, personally came R. Koehler, President of the Oregon and California Railroad Company, and A. G. Cunningham Secretary of the Oregon and California Railroad Company, whose names are subscribed to the foregoing instrument as parties thereto, and as President and Secretary of said Oregon and California Railroad Company both personally known to me to be the individuals named and described in and who executed the said instrument, and they severally acknowledged to me that he — said R. Koehler, as Pres-

424 dent and he the said A. G. Cunningham, as Secretary of the Oregon and California Railroad Company executed the foregoing instrument as and for the act and deed of said Oregon and California Railroad Company freely and voluntarily, and for the uses and purposes therein mentioned; and he the said A. G. Cunningham being by me duly sworn, did depose and say that he is the Secretary of the Oregon and California Railroad Company, and resides at East Portland Multnomah County, Oregon, that he is the legal custodian of, and is acquainted with and has in his possession the corporate seal of the Oregon and California Railroad Company; that the seal affixed to the foregoing instrument is such corporate seal; that the said was so affixed by him as Secretary of said Company, on the Sixth day of October, A. D. 1880 by order of the Board of Directors of said Company, that he signed his name thereto by the like order of the Board of Directors of said Company.

In Witness whereof, I have hereunto set my hand and affixed my official seal at the City of Portland, Oregon, the date first above written.

[NOTARIAL SEAL.]

I. R. MOORES,
Notary Public in and for Oregon.

Rec'd for Record Oct. 6, 1880 at 5 P. M.

425 S. GRUTZE recalled for the complainant.

Direct examination (continued).

Questions by Mr. FENTON:

— What do you find your records show, Mr. Grutze, with reference to this matter?

A. I find in the proceedings of the council of May 1, 1907, the following: "Communication from the Oregon & California Railroad Company relative to Fourth Street franchise was read, and by unanimous consent, same was referred to the Committee on Judiciary and Election."

Q. Now, when—that was May 1, 1907?

A. May 1, 1907.

Q. When was the ordinance No. 16491—when was it passed?

A. Passed May 1, 1907.

Q. And was it passed after the receipt, of this communication?

A. Yes, sir.

Q. How were those ordinances numbered—after they have passed, or before?

A. After they have passed.

Q. And the number, in this communication, of the ordinance, was left blank—as blank at the time the communication was received?

A. Yes, sir.

COURT: What became of the communication—was it ever reported back by the committee?

A. Yes, sir.

COURT: When?

A. Under date of May 16, 1907, I have the following entry:

426 "Committee on Judiciary and Election to whom was referred communication relative to Fourth Street franchise presented report recommending that said communication be placed on file."

Q. That was on the 16th?

A. May 16th, yes, sir.

Mr. KAVANAUGH: What action on that report—was it adopted?

A. By unanimous consent the report of the committee was adopted.

Q. Do you know whether this communication to which the report refers is the communication set out in Paragraph 8 of this complaint which I read to you this morning, bearing date May 1, 1907?

A. I could not say, but I don't find any other communication.

Q. That was the only communication that the record shows?

A. That is the only one that I have found.

Mr. FENTON: I will say that I find this Bill of Complaint does not correctly copy Ordinance No. 599 in the first section where it says: "Terms and conditions as hereafter provided". The ordinance is "As hereinafter" I will ask leave to correct the original complaint, so as to make the complaint comply literally with the ordinance. The word should be "hereinafter" in that place.

Witness excused.

Whereupon proceedings adjourned until Thursday, 2 P. M. December 2, 1909.

427

THURSDAY, December 2, 1909—2 p. m.

Mr. FENTON: I offer in evidence a certified copy of the report of the Commissioner of the United States appointed and instructed to examine the first section of twenty miles of railroad and telegraph line of the Oregon Central Railroad Company duly certified by the Acting Secretary of the Interior, and ask to have the same identified as Complainant's Exhibit K.

Mr. KAVANAUGH: Incompetent, irrelevant and immaterial.

COURT: It will be admitted subject to the objection.

Mr. KAVANAUGH: Save an exception.

Marked Complainant's Exhibit K.

428

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Oct. 6, 1892.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department.

In testimony whereof, I have hereunto subscribed my name and caused the Seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

GEO. CHANDLER,
Acting Secretary of the Interior.

The undersigned, Commissioner of the United States, appointed and instructed to examine the first section of 20 miles of the Railroad and Telegraph Line of the Oregon Central Railroad Company, respectfully report the examination of the said railroad, commencing in the City of Portland, and extending to a point near the Town of Hillsborough in Washington County, Oregon.

The grades and alignment of this Section of the road, as represented on the accompanying map and profile, as certified to by the President and Chief Engineer of said road, are such as from the obstacles to be overcome, and the capabilities of the ground, the

429 Government should, in the decided and fully concurrent judgment of the Commissioners, accept as a first class road:

This Section has of level line.....				4,394	ft.
From	0 to	10 ft.	per mile.....	11,000	"
"	10 "	20 "	" " " "	3,120	"
"	20 "	30 "	" " " "	13,071	"
"	30 "	40 "	" " " "	8,400	"
"	40 "	50 "	" " " "	1,739	"
"	50 "	60 "	" " " "	3,365	"
"	60 "	70 "	" " " "	27,460	"
"	70 "	80 "	" " " "	22,560	"
"	80 "	90 "	" " " "	6,273	"
"	90 "	100 "	" " " "	1,100	"
"	100 "	110 "	" " " "	519	in the City of Portland.

" 120 " 140 " " "	519	"
" 170 " 190 " " "	510	"
" 190 " 198 " " "	1,560	"
<hr/>		
There are tangent lines.....	83,663½	ft.
Curves of 2° and less	1,336	"
" " 2° to 4°	6,249	"
" " 4° to 6°	10,457½	"
" " 6° to 8°	2,088½	"
" " 8° to 10°	1,244	"
" " 10° to 12°	561½	"
<hr/>		
Making a total of.....	105,600	"

In regard to the steep grades in and through the City of Portland, they were not established by the Choice of the Company, but by the preemptory requirements of the City authorities, inhibiting a greater reduction of the established street grades within the limits of the city.

The City of Portland is situated on a rising plane and abuts against the Portland Mountains which rise at their crest to an average altitude of nearly 1,300 feet the road necessarily passes through the City before commencing the transit of the mountains by the most eligible pass practicable, and the Commissioners are satisfied that the grades within the City and across the mountains are in view of the topographical difficulties to be overcome, the lightest practicable. It is proper further to state that the steep grades within the City of Portland are practically within the range of the Company's depot grounds, and that for the purpose of making up their trains, they have established side tracks at the head of Fourth Street, just above the steep grades. The bridges are all built of wood (red and yellow fir) being the best and only suitable material along or within reach of this road, resting upon pile foundations, excepting where the ground was found too hard and rocky for piles, in which case the trestles rest on substantial timber foundations.

The bridges are either of 16 to 20 feet span; of the former there are:

4	bridges from	50	to	100	feet long
2	"	"	100	"	200
3	"	"	200	"	300
3	"	"	300	"	400
1	"	"	500	"	600
1	"	"	700	"	800

Of the latter (i. e. 20 feet span) there are

8	bridges from	50	to	100	feet long
2	"	"	100	"	200
3	"	"	300	"	400
1	"	"	400	"	500
1	"	"	700	"	800

In traversing the mountains a number of expensive bridges, of great altitude have been built across the intervening chasms. 431 These the commissioners find to be carefully and substantially constructed. The length of these bridges appears no greater than is required for sufficient waterway in the great freshets to which the Country is frequently subject.

A few of the deep cuts need widening in order fully to conform to the instructions issued last April by the Department, but the Chief Engineer informs the Commissioners that all this earth will be required and used without delay in filling up the Depot grounds in the City of Portland which are situated on a low and over-flown tract, that will require a large amount of earth which must be mainly obtained from those localities. These cuts are at present of sufficient width to secure a good drainage on each side of the track, and interpose no obstacles to the traffic of the road.

No gravel, rock or other suitable material for ballasting the road has, as yet, been found at any available point within the reach of this section of road, but an abundance of the best material for this use will be easily accessible when the road shall be extended to the upper part of the Willamette Valley. The Company has chosen to run the road for the present on the sub-grade rather than to top it out with suitable material.

The number of ties, all of red and yellow fir on the first eight miles, are between 2400 and 2500 per mile, of extra size and eight inches in thickness. On the remaining 12 miles the ties are laid two feet from center to center, and where the ground is soft, still closer; and as the timbers are large, often having from ten to twelve inches of bearing surface, the road is regarded as well tied.

432 The iron is of English manufacture and of good quality; the rails weigh 50 lbs. per lineal yard, and are fastened to each tie with four spikes, the joints being of fish plates with four bolts to each joint.

This iron, as appears from bills in the office of the company is of the purchases made and on the way, prior to the receipt of instructions from the Department requiring a heavier rail.

Of buildings and other structures there are 2 fifty feet, well constructed turn-tables; 2 engine houses each 20 by 60 feet, and 2 watering stations completed. There is also material for 2 combination freight and passenger houses, and 3 double section houses, delivered on the ground, and the buildings are in process of constructions.

There are 4 sidings, two of them in the City of Portland, the one at the terminus of the road 800 feet long, the other at the top of the grade 600 feet long, the siding at Beaverton is 1,000 feet in length, and that at Reedsville, according to the plans of the Engineer, 1,200 feet, is just being put down.

The rolling stock of the company consists of 2 locomotives, the one a powerful ten-wheeler, with 17 inch cylinder of 22 inches stroke and 6 driving wheels 43 inches in diameter. The other is also a powerful engine, especially adapted to the grades and heavy freight on the roads, with 16 inch cylinders of 24 inch stroke, and

4 driving wheels of 54 inches in diameter. 1 first class passenger car finely fitted up, 1 baggage and mail car, 10 box freight cars, completed and 10 more under contract, 12 platform cars, 8 hand cars, and 3 iron cars, all of which are substantially constructed, and adapted to the performance of the work required. There are also 2 other passenger cars under construction for this road, at the extensive and complete shops of the Oregon and California Railroad Company. It may not be out of place to mention here that the two roads being in the same interest the Oregon Central Railroad Company intend to have all their rolling stock constructed at these shops, which are also filling considerable contracts of the same character for the North Pacific Railroad.

The Commissioners find the Telegraph line completed to the end of the section and in good working order. The wires are of the best quality of iron, placed with glass insulators, upon substantial cedar poles, 20 to the mile.

After a thorough examination of this section of the Oregon Central Railroad, a careful consideration of the great topographical difficulties encountered and overcome; the severity of the season; the superior quality of the material used, the skill, care and perseverance exhibited in the construction of the road; the known character of the manager, and principal owner of the road, and the superior quality of the road, he is now constructing on the East side of this valley; the Commissioners do not hesitate to recommend the immediate acceptance of this first section of the Oregon Central Railroad.

Most respectfully submitted:
(Signed in duplicate.)

EDWARD R. GEARY,
JAMES H. FISK,
THOS. A. SAVIER,
Commissioners, O. C. R. R.

Subscribed and sworn to before me a Notary Public in and for the State of Oregon, this 6th day of January, 1872.

Witness my hand and notarial seal.

[SEAL.]

I. R. MOORES,
Notary Public, Portland, Oregon.

484 Mr. FENTON: I also offer a certified copy of the report of the committee who examined the second section of 27½ miles of the same road, from the twenty mile post to the Yamhill River, properly certified by the Acting Secretary of the Interior under seal of his office.

Mr. KAVANAUGH: Same objection.

Objection overruled. Exception saved.

Marked Complainant's Exhibit L.

435

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Oct. 5, 1892.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department, with its endorsement.

In testimony whereof, I have hereunto subscribed my name, and caused the Seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

GEO. CHANDLER,
Acting Secretary of the Interior.

436 Edward R. Geary, J. H. Fisk, C. H. Lewis, Commissioners

PORTLAND, OREGON, 3d May, 1876.

Report the completion of 27½ miles of the Oregon Central Railroad from its 20th mile post to the Yamhill River.

Z. B. S.

DEPT. OF THE INTERIOR, 23d June, 1876.

The section of road herein reported on is hereby accepted.

Z. CHANDLER, *Secretary.*

Filed Apl. 20, 1893.

R. H. LAMSON, *Clerk.*

437 The undersigned Commissioners of the United States duly appointed and instructed to examine the several sections and Telegraph line of the Oregon Central Railroad Company, respectfully report, that they have examined the Second Section of said road, extending from the 20 mile stake to St. Joseph in Yamhill county, a distance of 27½ miles; that they have found the grade and alignment of said section as represented on the accompanying map and profile, and as certified to, by the President and Engineer of said road; and that they are such; as from the topography of the country, and the capabilities of the ground, the Government should accept as a first class road.

This section has of level line.....	7,222 feet
From 0 to 10 feet grade per mile.....	36,100 "
10 to 20 " " " "	69,000 "
20 to 30 " " " "	23,800 "
30 to 40 " " " "	18,200 "
40 to 50 " " " "	13,200 "
50 to 60 " " " "	15,900 "
60 to 70 " " " "	18,193 "
70 to 80 " " " "	5,458 "

Making a total of.....144,971 "

Of Tangent Lines there are.....	103,992	"
Curves of 40'.....	4,560	"
" " 50'.....	810	"
" " 1'.....	15,842	"
Carried forward.....	125,204	"
438 Brought over	125,204	feet
Curves of 1° 20'.....	1,148	"
" " 1° 40'.....	1,844	"
" " 2°.....	14,609	"
" " 2° 50'.....	796	"
" " 3°.....	670	"
" " 6°.....	700	"
Making a total of.....	144,971	"

There are 21 pile bridges of an aggregate length of 7760 feet, which include,

2 Howe Truss bridges of 70 feet span each,

1 Queen Truss bridge of 60 feet span, and the rest are pile bent bridges of 20 feet span each, having 3 or 4 piles according to height thoroughly braced, with bearing stringers of 6 by 16 inches, strengthened and locked together by splicing blocks between the stringers, of the same depth and height, 10 feet long and upon which are placed ties 9 feet long and 18 inches from centre to centre, with guard rails 4 by 7 inches, placed on the top of the ties, and secured by bolts passing through the three timbers.

Besides the bridges there are 74 culverts having from 6 to 10 feet openings.

The character of the formation continues such as to afford at no available point yet discovered, material suitable for ballasting the road, nor can it be obtained until the road shall be extended 25 miles further up the valley of the Willamette.

The company still prefer to keep for the present on the subgrade, rather than to use the clay or friable rock, so little adapted to the required purpose.

439 The ties are of the required number per mile, hewn from red and yellow fir, the most suitable timber of the country, the ties are 6 inches thick and have a bearing surface of from 7 to 10 inches, so that the road is unusually well tied.

The iron is of the same weight and quality as that used on the first section of the road, being of English manufacture and weighing 50# per linear yard, the purchase having been made and afloat before the instructions of Government requiring a heavier rail was received. Fish plate fasteners are used with 4 bolts to each joint.

Of buildings and other structures on this section there are:

At Cornelius a freight and passenger Depot, and like buildings have been erected at North Yamhill and at St. Joseph, though one of the buildings at the last named place was accidentally burned a short time ago.

The company has induced other parties to build warehouses and granaries, of which there are, 1 at Hillsboro; 2 at Cornelius; 1 at Gaston; 2 at North Yamhill; 1 at Carlton; and 2 at St. Joseph. There is also a turntable of 50 ft. at St. Joseph. There is also and aggregate of 7600 feet of sidings distributed as follows:

At Hillsboro	700 feet
Cornelius	1300 "
Dilley's	400 "
Gaston	1500 "
North Yamhill	1300 "
Carlton	400 "
St. Joseph	2000 "

440 At Summit Beaverton Reedville and Cornelius Section
houses have been built since last report.

There has been added to the Rolling Stock, One 16 by 24 inch cylinder engine, with 4 drivers 54 inches in diameter and one 15 by 22 inch, with 4 drivers 60 inches in diameter; 1 First Class Passenger car, 10 box freight cars; 6 platform cars; 6 Hand cars and 3 iron cars; making an aggregate of 4 locomotives 2 first class passenger cars; 20 box cars; 2 stock cars; 18 platform cars; 30 dump cars; 19 hand cars, and 3 iron cars; being adequate at present for construction and the business of freight and travel.

The Telegraph Line is well constructed to the end of the section, and in good working order. The wire is of the best quality of iron placed with improved glass insulators upon substantial cedar poles 20 to the mile.

After careful examination the commissioners are satisfied with the construction of this section of the Oregon Central Rail Road, as skil-fully and faithfully done; and fully concur in recommending its acceptance to the most favorable consideration of the Department.

Most respectfully submitted.

EDWARD R. GEARY,
J. H. FISK,
C. H. LEWIS,

Commissioners Oregon Central Rail Road.

(Done in duplicate.)

Subscribed and sworn to before me a Notary Public in and for the State of Oregon this 3rd day of May, 1876.

Witness my hand and Notarial Seal Portland, Oregon.

[SEAL.]

J. R. MOORES,
Notary Public.

441 Mr. FENTON: I also offer a certified copy of a letter of J. Gaston, of date July 18, 1870, addressed to the Honorable J. D. Cox, Secretary of the Interior, Washington City, D. C., with the inclosures therewith purporting to be an acceptance of the Oregon Central Railroad Company signed by J. Gaston, President

of the Oregon Central, of date July 12, 1870, properly certified by the Acting Secretary of the Interior.

Objection. Objection overruled. Exception saved.

Marked Complainant's Exhibit M.

442

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Oct. 20, 1892.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the originals on file in this Department.

In testimony whereof, I have hereunto subscribed my name, and caused the Seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

GEO. CHANDLER,
Acting Secretary of the Interior.

443 Department of the Interior,
Aug. 1, 1870.

PORTLAND, OREGON, July 18, 1870.

SIR: Please place the enclosed document on file in your office, and acknowledge receipt of same, stating whether it be a satisfactory compliance with the Statute in relation to the matter of "Assent".

The Act of Congress is not referred to by the date of its approval, as we were not aware of the day the President did approve it.

Respectfully,

J. GASTON.

To Hon. J. D. Cox, Secretary of Interior, Washington City, D. C.

444 Know all men by these Presents: That at a special meeting of the Board of Directors of the Oregon Central Railroad Company of Portland, Oregon, duly called and legally held at the office of the Company in Portland, Oregon, on Saturday, July 2nd A. D. 1870 at eight o'clock P. M. the following Resolution was duly and regularly adopted: "Resolved: That the Oregon Central Railroad Company hereby assents, and expresses their assent and acceptance of all and singular of the provisions of the Act of Congress entitled, 'An Act granting lands to aid in the construction of a Railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon', which Act was passed by the Senate of the United States Congress on the 20th day of February, 1870, and by the House of Representatives of said Congress on the 29th day of April, 1870; and that the President of this Company be hereby authorized, empowered and directed to forward a copy of this Resolution to the Secretary of the Interior at Washington City, D. C. and file the same in his office."

Now, therefore, be it known, that by virtue of the foregoing Resolution, and the power in me vested, I have prepared and executed this Instrument on behalf of the said Oregon Central Railroad Company, and for the purposes set forth in said Resolution.

In testimony whereof I have here set my official signature, and the seal of said corporation, at Portland, Oregon, this 12th day of July, A. D. 1870.

[SEAL.]

J. GASTON,
President Oregon Central Railroad Company.

445 Mr. FENTON: I offer in evidence a certified copy of letter of Secretary Zachary Chandler, of June 23, 1876, properly certified by John W. Noble, Secretary of the Interior, showing the acceptance of the second section of the road by the United States.

Mr. KAVANAUGH: Same objection.

Objection overruled. Exception saved.

Marked Complainant's Exhibit N.

446

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., September 30, 1892.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of a letter of the Secretary of the Interior, addressed to the President of the Oregon Central R. R. Co. dated June 23, 1876.

In testimony whereof, I have hereunto subscribed my name, and caused the Seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

JOHN W. NOBLE,
Secretary of the Interior.

447 "Endorsed": Filed Apr. 20, 1893. R. H. Lamson, Clerk

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 23 June, 1876.

SIR: I have to inform you that I have today accepted the section of the Oregon Central Railroad extending from the 20th mile post to the Yamhill river, a distance of 27½ miles, reported on by Mess. Geary, Fisk and Lewis, on the 3rd ult.

The map and profile accompanying the report have been transmitted to the Commissioner of the General Land Office, for appropriate action.

I am sir, very respectfully,

Your ob't servant,

Z. CHANDLER, *Secretary.*

The President of the Oregon Central R. R. Co., Portland, Oregon.

448 Mr. FENTON: I will offer in evidence a certified copy of a letter of Secretary J. D. Cox, of date August 2, 1870, advising the acceptance of the assent.

Mr. KAVANAUGH: Objection.

Objection overruled. Exception taken.

Marked Complainant's Exhibit O.

449

"Endorsed": Filed Apr. 20, 1893. R. H. Lamson, Clerk.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Oct. 20, 1892.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original of record in this Department.

In witness whereof, I have hereunto subscribed my name, and caused the Seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

GEO. CHANDLER,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., August 2nd, 1870

SIR: The Oregon Central Railroad Company, by J. Gaston, President, has filed in this Department a resolution of the Board of Directors giving assent to the terms and conditions of an Act of Congress entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," Approved May 4, 1870.

As there have been two companies by the name of the Oregon Central Railroad Company of Oregon, and your company is the assignee of one of them, I have thought it proper to notify you of the filing of said assent, and to request you to advise me, without delay, whether your company claim any rights under said Act of Congress.

Very respectfully,

Your ob't servant,

J. D. COX, *Secretary.*

Ben Holladay, Esq., Pres't Oregon & Col. R. R. Co., Portland, Oregon.

451 Mr. FENTON: A certified copy of a communication from the Oregon Central Railroad Company addressed to the Secretary of the Interior, the Honorable J. D. Cox, of date September 21, 1870, a disclaimer of the Oregon Central Railroad Company of Salem, September 18, 1870, as to any interest in this grant, and the letter of Senator Williams, September 21, 1870, addressed also to the Secretary of the Interior, all properly certified, in relation to the same matter.

Marked Complainant's Exhibit P.

452

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Oct. 20, 1892.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the original on file in this Department.

In testimony whereof, I have hereunto subscribed my name, and caused the Seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.]

GEO. CHANDLER,
Acting Secretary of the Interior.

453 "Endorsed": Filed Apr. 20, 1893. R. H. Lamson, Clerk
Department of the Interior,
Oct. 7, 1870.

PORTLAND, OREGON, *Sept. 21st, 1870.*

SIR: Enclosed please find certain documents, which please place on file, with the "Assent" heretofore sent you on the 18th of July, 1870.

I am directed to notify you that the Oregon Central Railroad Company, and their assignee, The Willamette Valley Railway Company, objects and protests against the withdrawal of any public lands for the Northern Pacific Railroad Company, on their line between Portland, Oregon, or Vancouver W. T. and Puget Sound, until such reasonable time as the two first named companies can file their maps on their line between Portland and Astoria Oregon; for the reason, that the land Grants of these several companies, or these lines, will overlap each other, and the grant of the first named companies being prior in time, is prior in right.

Respectfully yours,

J. GASTON,
Sec'y O. C. R. R. Co.

Hon. J. D. Cox, Sec'y Dep't Interior, Washington, D. C.

454 Office of The Oregon Central Railroad Company.

SALEM, *Sept. 19, 1870.*

SIR: At the request of J. Gaston, Secretary of the Oregon Central Railroad Company of Portland, Oregon, we the undersigned hereby certify that "The Oregon Central Railroad Company of Salem, Oregon, was discontinued and dissolved according to the laws of Oregon, on the seventh day of April, 1870, and does not now exist as a corporation or company under the laws of this state.

Respectfully yours,

I. R. MOORES,
Pres't O. C. R. R. Co. of Salem;
GEO. E. COLE,
Sec'y O. C. R. R. Co. of Salem.

To Hon. J. D. Cox, Sec'y Dep't Interior, Washington, D. C.

455

PORTLAND, OREGON, *Sept. 21st, 1870.*

SIR: J. Gaston, Sec'y of the Oregon Central R. R. Company, has handed me your letter of August 2nd, 1870, addressed to him as

the President of said Company, in which you state that the "Assent" offered by said Company to the provisions of an Act of Congress entitled "An Act granting lands to aid in the construction of a Railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon," approved May 4, 1870, will be accepted as a sufficient "Assent" to said Act, if it be shown that the company which Mr. Gaston represents, is "the company for whose benefit the said grant was made". I can state of my own knowledge that the Company of which Mr. Gaston was formerly President, and of which he is now Secretary, is the corporation entitled to the benefits of said Act and for which it was passed.

The East Side Oregon Central R. R. Co. was regularly disincorporated and dissolved by voluntary action of its stockholders, before the above named Act of Congress became a law; and the Company which Mr. Gaston represents is now the only corporation under its name in this State.

Respectfully yours,

GEO. H. WILLIAMS.

Hon. J. D. Cox, Sec'y Dep't of Interior, Washington, D. C.

456 Mr. FENTON: Certified copy of the Articles of Incorporation of the Oregon Central Railroad Company, filed November 23, 1866, properly certified by the former county clerk of this county.

Marked Complainant's Exhibit Q.

457 Know all Men by these Presents:—That we, the undersigned Citizens of Oregon, do hereby associate ourselves together as a private Corporation, under and by virtue of the provisions of the General Incorporation law of said State.

1st. The Corporation hereby created shall be known as "The Oregon Central Railroad Company", and its duration unlimited.

2nd. The object and business of the Corporation shall be to construct and operate a railroad from the City of Portland through the Willamette Valley to the Southern Boundary of the State; under the laws of Oregon, and the law of Congress, recently passed granting land and aid, for such purpose.

3rd. The corporation shall have its principal office in the City of Portland.

4th. The capital stock of said Corporation shall be Five Million Dollars, divided into general and preferred interest bearing stock, in such proportions as the Incorporators, or Board of Directors, may deem proper.

5th. The amount of each share of the capital stock shall be one hundred dollars.

6th. The termini of the Railroad proposed to be constructed by said Company, shall be for the Northern end, at the City of Portland, and for the Southern end at some point on or near the Southern boundary of the State, as may be hereafter determined, by actual survey.

In Witness Whereof we have here set our hands and seals this
— day of September A. D. 1866.

U. S. Rev. Stamp 5c.

458

J. S. SMITH.	[SEAL.]
I. R. MOORES.	[SEAL.]
J. H. MITCHELL.	[SEAL.]
E. D. SHATTUCK.	[SEAL.]
JESSE APPLGATE.	[SEAL.]
F. A. CHENOWETH.	[SEAL.]
JOEL PALMER.	[SEAL.]
H. W. CORBETT.	[SEAL.]
M. M. MELVIN.	[SEAL.]
GEO. L. WOODS.	[SEAL.]
R. R. THOMPSON.	[SEAL.]
J. C. AINSWORTH.	[SEAL.]
S. G. REED.	[SEAL.]
JOHN McCracken.	[SEAL.]
C. H. LEWIS.	[SEAL.]
B. F. BROWN.	[SEAL.]
T. H. COX.	[SEAL.]
J. GASTON.	[SEAL.]

STATE OF OREGON,
Marion County, ss:

Be it known that the persons whose names are attached to the foregoing articles of Incorporation, appeared before the undersigned, a Notary Public for and within said County and State, respectively at the times and places herein named, to-wit:—J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. A. Chenoweth, Joel Palmer and H. W. Corbett, at Salem in said State on or about the 29th day of September 1866, and M. M. Melvin at Salem on or about October 23rd 1866, and George L. Woods at Salem on or about Nov. 10th 1866, and R. R. Thompson, J. C. Ainsworth, S. G. Reed, Jno. McCracken and C. H. Lewis at Portland, Oregon on the 16th day of November 1866; And they
459 the said several subscribing persons to the aforesaid Articles of Incorporation, did then and there, at the several times set forth in this certificate, sign and seal said Articles, before me, and in my presence, and acknowledged the said signing and sealing to be their voluntary act and deed for the purposes set forth in said Articles.

In Witness Whereof, I have here set my signature as said Notary Public, and attached my official seal this 16th day of November, 1866.

U. S. Rev. Stamp 5c.

[NOTARIAL SEAL.]

J. GASTON,
Notary Public.

STATE OF OREGON,
County of Marion, ss:

On this 20th day of November, A. D. 1866, before me, a Notary Public in and for said County, personally came the within named B. F. Brown, Thos. H. Cox, and J. Gaston, who are personally known to me to be the identical persons whose names are subscribed to the within instrument and acknowledged to me that they signed the same for the purposes therein set forth.

Witness my hand and seal of office this the 20th day of November A. D. 1866.

[NOTARIAL SEAL.]

SETH R. HAMMER,
Notary Public.

This is evidently the Articles of Incorporation presented by Gaston, for Filing on the 6th day of Oct. 1866, as I recognize the letters & figures on the bottom to have been made by me at that date, which I have not seen from that date to this.

Ja'y 19/69.

SAMUEL H. MAY,
Sec'y of State.

"Endorsed": Filed Nov. 23, 1866. H. C. Coulson, Clerk.

460 Mr. FENTON: A certified copy of the Articles of Incorporation of the Oregon & California Railroad Company of date March 16, 1870.

Marked Complainant's Exhibit R.

461 COMPLAINANT'S EXHIBIT R.

Articles of Incorporation of the Oregon and California Railroad Company.

Know all Men by these Presents: That we, the undersigned Corporators, Ben Holladay, of New York, and Cicero H. Lewis, I. R. Moores, J. C. Hawthorne and Medorem Crawford, of the State of Oregon, do by these presents, associate ourselves together as a Corporation and body politic, under and by virtue of the general Incorporation laws of the State of Oregon, approved Oct. 14, A. D. 1862, and amendments thereto, and for such purpose we do jointly and severally hereby agree to and with each other to the following Articles:

Article First. The name assumed by this Corporation and by which it shall be known is the "Oregon and California Railroad Company."

Article Second. The duration of this corporation shall be Ninety-nine years.

Article Third. The enterprise, business pursuit and occupation in which this Corporation proposes to engage, is to construct a railroad and telegraph line with all the necessary branches, side tracks, fix-

tures, buildings, depots, stations and appurtenances, from Portland, in the State of Oregon, and running thence Southerly through the Willamette, Umpqua and Rogue River Valleys to the California line on the Southern boundary of Oregon, to connect with the railroad and telegraph line now being constructed northerly through the State of California by the California and Oregon Railroad Company, toward the Southern boundary of Oregon, and to purchase, own, construct, hold, equip, operate and use all necessary ferries on the line of such road over the Willamette and other rivers, and over any river or rivers, on either side of the line of such railroad,

462 which may be necessary or proper, in crossing freight and passengers to and from the said railroads. To maintain the said Railroad and telegraph line in good order, condition and repair, and to operate the said railroad, and employ the same, and the said telegraph line in the business of transporting passengers and freight, and the United States mails; And for the Purpose afore-

said, to purchase, take and receive of and from the (U. S. Rev. "Oregon Central Railroad Company" of Salem, Ore- Stamp 5¢) gon, incorporated April 23rd, A. D. 1867, that portion (U. S. Rev. of its railroad and telegraph line, now completed, Stamp 5¢) together with all the property real, personal and (U. S. Rev. mixed, and right of way of such last named Corpora- Stamp 5¢) tion of whatsoever name and nature and all its rights

and franchises of every name and nature, both legal and equitable, which the said last named corporation now has or owns, or to which it is in any way or manner entitled, or hereafter may be entitled to, whether the same is absolute or contingent, and particularly and especially all the right, title, interest, franchise, claim and demand which the said "Oregon Central Railroad Company" of Salem, Oregon, aforesaid, now has or is entitled to and which it may hereafter be entitled to under and by virtue of an act of Congress, entitled "An Act granting lands, to aid in the construction of a Railroad and telegraph line from the Central Pacific Railroad in California to Portland, In Oregon." Approved July 25th, 1866, and of all amendments thereto.

The purpose of this Corporation being to make such portion of the railroad and telegraph line of said "Oregon Central Railroad Company" which is now completed, a part of the line of Railroad and telegraph, which this corporation proposes to construct as aforesaid, from Portland, Oregon, to the California line, and to 463 construct and equip the whole line thereof, from Portland, in Oregon, to said California line in all respects in accordance with the act of Congress hereinbefore referred to and the amendments thereto. And for the Purpose of receiving all the benefits of such act of Congress, and amendments thereto, intended to be conferred thereby on the Oregon Company, and for the purpose of complying with all the provisions of such act.

Article Fourth. The principal office for the transaction of the business of this Corporation shall be kept at the City of Portland, Multnomah County, State of Oregon.

Article Fifth. The amount of the Capital stock of this Corporation is hereby fixed at Twenty Millions of Dollars (\$20,000,000.00).

Article Sixth. The amount of each share of such capital stock is hereby fixed at One Hundred Dollars.

In Testimony Whereof, and of our adoption of the foregoing Articles of Incorporation, we, the undersigned, corporators have hereunto set our hands and seals, this Sixteenth (16th) day of March, A. D. One thousand Eight hundred and Seventy (1870) in Triplicate.

BEN HOLLADAY.	[SEAL.]
CICERO H. LEWIS.	[SEAL.]
I. R. MOORES.	[SEAL.]
J. C. HAWTHORNE.	[SEAL.]
MEDOREM CRAWFORD.	[SEAL.]

464 STATE OF OREGON,
County of Multnomah, ss:

Be it Remembered, That on this Sixteenth (16th) day of March A. D. 1870, before me, the undersigned a Notary Public in and for Multnomah County, State of Oregon, personally appeared the above named corporators, Ben Holladay, Cicero H. Lewis, I. R. Moores, J. C. Hawthorne and Medorem Crawford, all to me personally known as being the persons named in and who as corporators made and subscribed the foregoing articles of incorporation, and (U. S. Rev. Stamp 5c.) severally acknowledged to me that they each of them executed the foregoing Articles of Incorporation, freely and voluntarily and for the uses and purposes therein specified.

Witness my hand and official seal the day and year in this Certificate first above written.

[NOTARIAL SEAL.]

GEO. W. MURRAY,
Notary Public.

"Endorsed": Filed March 17, 1870, at 8:30 A. M. B. L. Norden, Clerk. By Joseph R. Wiley, Deputy.

465 Mr. FENTON: A certified copy of the Supplementary Articles of the Oregon & California Railroad Company of date May 22, 1879, authorizing the authorities to purchase the Oregon Central Railroad Company.
Marked Complainant's Exhibit S.

466 Know all Men by These Presents, That we, the undersigned Henry Villard, Richard Kohler, J. N. Dolph, Paul Schulze and C. H. Lewis, being all the Directors of the Oregon & California Railroad Company, in pursuance of a resolution to that effect, of a special meeting of the stockholders of said Oregon & California Railroad Company, passed by the unanimous vote of all the stock of the Company, on the 22nd day of May A. D. 1879, Do Hereby adopt and file the following:

Supplementary Articles of Incorporation of the Oregon & California Railroad Company.

The Oregon & California Railroad Company Hereby adopts the following supplementary Articles of Incorporation, in addition to the present Articles of Incorporation, for the purpose of engaging in the new enterprises or business pursuits hereinafter specified, in addition to the enterprise described in the original Articles, and in the same manner, as if there were inserted at the end of the third of the original articles, the following provisions:

Second. To purchase, or lease, or operate and maintain on such terms as may be agreed upon the Railroad and Telegraph lines or any part thereof of the Oregon Central Railroad Company, the Western Oregon Railroad Company, as the same are now constructed, or may be hereafter respectively constructed and extended, and any and all other railroads, constructed or to be hereafter constructed, in Oregon, California or Nevada, and connecting or intended to connect with the Railroad of this Corporation, or any Railroad owned, leased, or operated by this Company, or by any Company of the stock of which this Company may own a controlling interest, with the rolling stock, equipment, and appurtenances of any such Railroad.

And to purchase or charter and manage and operate steamships and steamboats, for transportation of freight and passengers from and to points on the Railroad of this Corporation or other Railroads at any time owned or operated by it.

Third. To facilitate and assist the construction and equipment of the Railroad and Telegraph lines of the Oregon Central Railroad Company, or Western Oregon Railroad Company, or any other Railroads in Oregon, California or Nevada, connecting or intended to connect with the Railroads of this Corporation, or with any railroad, leased owned or operated by this Corporation or with the Railroad of any Corporation, in the stock of which this Company has a controlling interest, and for such purpose to subscribe for or purchase the stocks or bonds of any such company and also to purchase the stock or bonds of any steamship or steamboat Company, formed for the operation of steamships or steamboats from or to points on the Railroad of this Corporation, or other railroads at any time owned or operated by it, to guarantee or secure the payment of any such bonds or the interest thereon by pledge or mortgage of this Corporation, or any part thereof or otherwise.

Fourth. To obtain from time to time from the Legislatures of said States the necessary charters or other authorization, for carrying out and facilitating the above objects, or any of them.

Fifth. To purchase or acquire lands or lots, whether adjacent or contiguous to its Railroad or not, and to lease, sell, mortgage or otherwise dispose of such lands, in such manner as may be deemed fit.

Sixth. To borrow money on bonds notes or otherwise, for the general purposes of the Corporation, and to mortgage its

Railroad or any Railroads at any time owned by it, their branches franchises, rolling stock, and any or all other property of said Corporation to secure the payment thereof.

Seventh. To do all other things necessary or proper for the accomplishing any or all of the objects above specified.

In Witness Whereof, we have to these presents, executed in triplicate, set our hands and seals, and the Corporate Seal of said Company, this 22nd day of May, A. D. 1879.

HENRY VILLARD.

R. KOEHLER. [SEAL.]

J. N. DOLPH. [SEAL.]

PAUL SCHULZE. [SEAL.]

C. H. LEWIS. [SEAL.]

Signed and sealed in the presence of—

JNO. D. BILES.

A. G. CUNNINGHAM.

[CORPORATE SEAL.]

STATE OF OREGON,

County of Multnomah, ss:

Be it Remembered that on this twenty-second day of May 1879 before me, the undersigned, a Notary Public in and for said County & State, personally appeared the above named Henry Villard, Richard Koehler, J. N. Dolph, Paul Schulze & C. H. Lewis who are known to me to be the identical persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same, for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and
469 Notarial Seal, the day & year last above written.

[NOTARIAL SEAL.]

JOHN D. BILES,
Notary Public.

"Endorsed:" Filed May 24, 1879, at 11:45 A. M. James A. Smith, County Clerk.

470 Mr. FENTON: Supplementary Articles of the Oregon & California Railroad Company of date July 5, 1883.
Marked Complainant's Exhibit T.

471 *Supplementary Articles of Incorporation.*

Whereas at a special meeting of the Stockholders of the Oregon and California Railroad Company, held at the office of said Company, in the City of Portland, in the County of Multnomah, in the State of Oregon, all of the Stockholders of said Company being present, or duly represented by proxy, on the 10th day of April A. D. 1883, the following resolution, by the unanimous vote of all

the stockholders and of all the stock of said Company subscribed, was adopted, namely:—

Resolved, That the Directors of this Corporation be and they are hereby instructed and directed to file as soon as they can be reasonably prepared and executed, Supplementary Articles of Incorporation, amending Article 3, of the present Articles of this Company, as Amended by the Supplementary Articles heretofore filed, by inserting after the Seventh subdivision of said Article 3, the following subdivisions:

Eighth. With the consent of the holders of an absolute majority in amount of the preferred stock of the Company at the time actually issued and outstanding, to sell and dispose of its railroad and property or any part thereof, to lease, demise and let to any other company or corporation incorporated under the laws of Oregon, or authorized to operate railroads and transact business in the State of Oregon, all and singular its railroad and telegraph line then constructed or to be constructed or any portion thereof, with side tracks, depots, warehouses, stockyards, locomotives, cars, and other rolling stock, machinery and fixtures and appurtenances, ferries, and ferry boats and all lands, easements, rights of way, and

472 property used in connection therewith, to enter into any operating or traffic contract in the nature of a lease with any such other company or corporation, transferring to such company or Corporation the management and operation of its roads or any part thereof, to consolidate with any other corporation, to lease and operate the railroad or railroads of any corporation, to guarantee the payment of and assume the liabilities of any other corporation for bonds, coupons, dividends or otherwise, to file supplementary articles of incorporation, authorizing the corporation to engage in new enterprises, to increase the preferred or common capital stock or both and to construct and equip a railroad and telegraph line with all necessary branches from a point at or near Forest Grove in Washington County, Oregon, to Astoria in Clatsop County, Oregon, to connect with its existing railroad and to operate and maintain the same, and carry freight and passengers thereon and receive tolls for the same.

Ninth. To construct and equip a railroad and telegraph line with all necessary branches, from the City of Portland, in Multnomah County, Oregon, via Hillsboro and McMinnville to Corvallis in Benton County, Oregon, and a railroad and telegraph line with all necessary branches from Corvallis in Benton County Oregon, to Junction City in Lane County Oregon, and to maintain and operate the same, and transport freight and passengers thereon, and to receive tolls therefor.

Tenth. To construct, operate and maintain a railroad bridge or railroad and wagon road bridge or both across the Willamette River, between the Cities of Portland and East Portland or above or below said cities, to connect its present railroads, and to collect and receive tolls for the passage of railroad trains and cars, goods, 473 wares and merchandise, teams, wagons and other vehicles, live stock and foot passengers over the same.

Know all men by these Presents, That we, the undersigned Henry Villard, H. R. Baltzer, H. W. Corbett, Robert Davie Peebles, D. Macleay, A. H. Morgan, George Henry Hopkinson, John McCracken, R. P. Earhart, Patrick Buchan and Wm. Mackintosh, being all the qualified and acting Directors of the Oregon and California Railroad Company in pursuance of said resolution do hereby adopt the following

Supplementary Articles of Incorporation of the Oregon and California Railroad Company.

The Oregon and California Railroad Company hereby adopts the following Supplementary Articles of Incorporation for the purpose of engaging in the new enterprises or business pursuits hereinafter specified in addition to the enterprises described in the original Articles, and in the same manner as if they were inserted at the end of the Seventh subdivision of Article 3 of the original Articles as amended by the Supplementary Article heretofore filed, the following provisions:

Eighth. With the consent of the holders of an absolute majority in amount of the preferred stock of the Company at the time actually issued and outstanding, to sell and dispose of its railroad and property or any part thereof, to lease, demise, and let to any other company or corporation incorporated under the laws of Oregon or authorized to operate railroads and transact business in the State of Oregon, all and singular its railroad and telegraph lines then constructed or to be constructed or any portion thereof, with side
474 tracks, depots, warehouses, stockyards, locomotives, cars, and other rolling stock, machinery and fixtures, and appurtenances, ferries and ferryboats and all lands, easements, rights of way and property used in connection therewith, to enter into any operating or traffic contract in the nature of a lease with any such other company or corporation transferring to said Company or Corporation the management and operation of its roads or any part thereof, to consolidate with any other Corporation, to lease and operate the railroad or railroads of any corporation, to guarantee the payment of and assume the liabilities of any other corporation, for bonds, coupons, dividends, or otherwise, to file Supplementary Articles of Incorporation, authorizing the Corporation to engage in new enterprises to increase its preferred or common capital stock or both, and to construct and equip a railroad and telegraph line with all necessary branches, from a point at or near Forest Grove in Washington County, Orgeon, to Astoria in Clatsop County, Oregon, to connect with its existing railroad and to operate and maintain the same and carry freight and passengers thereon and receive tolls for the same.

Ninth. To construct and equip a railroad and telegraph line with all necessary branches, from the City of Portland in Multnomah County, Oregon, via Hillsboro and McMinnville to Corvallis in Benton County, Oregon, and a railroad and telegraph line with all necessary branches from Corvallis in Benton County, Oregon, to

Junction City in Lane County, Oregon, and to maintain, operate the same, and transport freight and passengers thereon, and to receive tolls therefor.

Tenth. To construct, operate and maintain a railroad bridge, or railroad and wagon road bridge or both, across the Willamette River, between the Cities of Portland, and East Portland, or above or below said cities to connect its present railroads, and to collect and receive tolls for the passage of railroad trains, and cars, goods, wares and merchandise, teams, wagons and other vehicles, live stock and foot passengers over the same.

In Witness Whereof, we have to these Presents, executed in triplicate, set our hands and seals, and the Corporate seal of said Company, this 5th day of July, A. D. 1883.

R. D. PEEBLES.	[SEAL.]
PATRICK BUCHAN.	[SEAL.]
G. H. HOPKINSON.	[SEAL.]
H. VILLARD.	[SEAL.]
H. R. BALTZER.	[SEAL.]
R. P. EARHART.	[SEAL.]
A. H. MORGAN.	[SEAL.]
WM. MACKENTOSH.	[SEAL.]
H. W. CORBETT.	[SEAL.]
J. McCracken.	[SEAL.]
DONALD MACLEAY.	[SEAL.]

In presence of
Consulate General U. S., London.

As to H. Villard & H. R. Baltzer,

H. H. TYNDALE.
GEO. A. SAXER.

Signed and Sealed by R. P. Earhart, A. H. Morgan, Wm. Mackintosh, H. W. Corbett, J. McCracken, and Donald Macleay, in the presence of

J. B. SCOTT.
JOSEPH SIMON.

KINGDOM OF GREAT BRITAIN,
City of London, England, ss:

Be it Remembered, That on this 5th day of July, 1883, before me the undersigned Libbens H. Mitchell, Vice and Deputy Consul General, and a Notary Public ex-officio of the United States of America at London, personally appeared the above named Robert Davie Peebles, Patrick Buchan and George Henry Hopkinson, who are known to me to be the identical persons described in and who executed the foregoing instrument and severally acknowledged to me, that they executed the same, for the uses and purposes therein mentiond.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the date above written.

[SEAL.]

L. H. MITCHELL,
Vice and Deputy Consul General.

STATE OF NEW YORK,
City and County of New York, ss:

Be it Remembered, that on this 11th day of August, 1883, before me Hector H. Tyndale, a duly appointed Commissioner of the State of Oregon, in and for the State of New York, residing in said City of New York, personally appeared the above named Henry Villard, and Hermann R. Baltzer, who are known to me to be the identical persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand affixed my seal of office on the date above written.

[SEAL.]

HECTOR H. TYNDALE,
Commissioner for Oregon in New York.

STATE OF OREGON,
County of Multnomah, ss:

Be it Remembered, that on this First day of September, 1883, before me, the undersigned, a Notary Public in and for said
477 County and State personally appeared the above named R. P. Earhart, A. H. Morgan, Wm. Mackintosh, H. W. Corbett, J. McCracken and Donald Macleay, who are known to me to be the identical persons described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the date in this Certificate above written.

[NOTARIAL SEAL.]

J. B. SCOTT,
Notary Public in and for the State of Oregon.

"Endorsed:" Filed Sept. 5, 1883. Wm. R. Sewall, Clerk.

478 Mr. FENTON: Certified copy of the minutes of the Oregon Central Railroad Company, September 8, 1880, which I offer to substitute in lieu of the record, and ask to have the reporter use these to check up with the original.

For the same purpose I offer certified copy of the minutes of the Oregon & California Railroad Company of May 22, 1879, authorizing the filing of Supplementary Articles by the Oregon & California Railroad Company, and if I haven't offered the pages that cover that, I now offer the minutes to show that, and ask to have this checked up with these minutes.

Above papers included in Complainant's Exhibit I.

479 Mr. FENTON: A certified copy of the map of definite location of the Oregon Central Railroad Company in Oregon, showing the located line from Portland by way of Forest Grove, to a point on the Yamhill River, at a point at or near McMinnville. I have not that here. That will be a public document, together with the official action of the Secretary of the Interior approving the map, and the order of that directly based thereon.

Mr. KAVANAUGH: I object to all these. I wish to take objection categorically.

Court: It will be admitted under your objection.

Mr. KAVANAUGH: Save an exception.

Marked Complainant's Exhibit U.

480 Mr. FENTON: I will take the time, if the Court will allow me, to offer now a certified copy of the order of this court made in the suit of Lawrence Harrison and others versus The Oregon & California Railroad Company, modifying the injunction granted in that case to permit the Directors of the Oregon & California Railroad Company to take the action which they did take in respect to the purchase of this property. The property was then in the hands of a receiver, and I will get a certified copy of that.

Marked Complainant's Exhibit V.

(Included in H, Page 185.)

481 Mr. R. KOEHLER resumes the stand.

Direct examination (continued):

Q. Mr. Koehler, you were Vice-president and executive officer and a member of the Board of Directors of the Oregon & California Railroad Company on July 1, 1887, the date the properties of the Oregon & California were leased to the Southern Pacific, were you not?

A. Yes, sir.

Q. I will ask you to state if you recognize the signatures of the various parties to the instrument which I now show you, and which, for the purpose of identification may be marked Complainant's Exhibit W, purporting to be the lease—the original lease of July 1, 1887, by the Oregon & California to the Southern Pacific Company for the term of 40 years, and will ask you if you recognize the signatures of the various parties who have signed that document as the signatures of the parties they purport to be?

A. I do.

Q. You were acquainted with their signatures, were you?

A. I was.

Q. And the signatures in writing signed there are the signatures of the persons they severally purport to be?

A. Yes, sir.

Q. They were, at the times they purport to have been, the various officers of the various companies?

A. Yes, sir.

Mr. FENTON: I offer that and ask leave to substitute a copy. That is the only original we have.

Marked Complainant's Exhibit W.

481½

COMPLAINANT'S EXHIBIT "W."

This agreement, made this first day of July, 1887, between The Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, and The Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky:

Witnesseth: That the said Oregon and California Railroad Company hereby leases to the said Southern Pacific Company for the term of forty (40) years from the date hereof, all of its railroad situated in the State of Oregon known and designated as the Oregon and California Railroad with all its branches, together with the rolling stock, telegraph lines, tools and property of every kind and nature whatsoever in use upon or in connection with the said railroad and together with all the appurtenances thereunto belonging, with the right to possess, maintain, use and operate the said property and to receive the rents, issues and profits thereof.

In consideration thereof the said Southern Pacific Company agrees to and with the said Oregon and California Railroad Company that during the continuance of this lease it will keep the said leased property in good order condition and repair, operate, maintain, add to and better the same at its own expense, pay all taxes legally assessed against the same or levied thereon and pay the interest as it shall mature on such of the First Mortgage Bonds of said Oregon and California Railroad Company secured by indenture or deed of trust to the Union Trust Company of New York, dated July 1st, 1887, as may be issued in respect of its now existing lines or the extension now under construction of its main line to the boundary between Oregon and California, or as may be hereafter guaranteed

482 by said Southern Pacific Company, and that it will on the first day of May in each year during the continuance of this lease pay to said Oregon and California Railroad Company such balance if any of the net earnings or income received by said Southern Pacific Company from the said leased premises with the appurtenances for the year ending on the thirty-first day of December then next preceding as shall remain in its hands after all charges and expenses incurred by it hereunder and all the payments for taxes and interest hereinbefore provided for or agreed or directed to be made, and all current fixed charges of the Oregon and California Railroad Company, and all indebtedness of said Railroad Company to said Southern Pacific Company are paid, provided that if such balance of net earnings or income received by the Southern Pacific Company from the said leased premises with the appurtenances for any year, which by the foregoing provisions hereof, would be and become payable by said Southern Pacific Company to said Oregon and California Railroad Company, shall exceed the amount of seven per centum upon the par value of the then existing preferred stock of the Oregon and California Railroad Company, and six per cent per annum upon the value of the then existing common stock of said Oregon and California Railroad Company, then

and in that event the said Southern Pacific Company shall be entitled to and shall retain, to itself for its own use any and all excess of such balance of net earnings and income over and above the amounts of seven per centum per annum upon the par value of the preferred stock and six per centum per annum upon the par value of the common stock of said Oregon and California Railroad Company; and said Southern Pacific Company further agrees to and with the

said Oregon and California Railroad Company that it will
 483 upon the termination of this lease return the said premises to the said Oregon and California Railroad Company or its successors with its additions and betterments in as good condition and repair as the same were at the date hereof; and in further consideration of this lease it has agreed to execute and will execute a guaranty of the payment of the principal and interest of such of the bonds of the issue above mentioned as may be issued in respect of its now existing lines or the extension now under construction of its main line to the boundary between Oregon and California and of such further bonds of said issue as the said Oregon and California Railroad Company may during the existence of this lease request it to guarantee.

It is understood and agreed that the mortgage from the Oregon and California Railroad Company to the Union Trust Company of New York bearing date July 1st, 1887, and the bonds issued thereunder have and shall have priority of lien upon the mortgaged property over the lien and claim of the Southern Pacific Company as lessee hereunder.

In testimony whereof, the parties hereto have caused these presents to be signed by their respective Presidents and their respective corporate seals to be hereunto affixed and attested by their respective Secretaries the day and year first above written.

OREGON AND CALIFORNIA RAIL-
ROAD CO.,

By R. KOEHLER, *2nd Vice President.*

[Oregon and California Railroad Company Seal.]

Attest:

GEO. A. ANDREWS,
Secretary Pro tem.

SOUTHERN PACIFIC COMPANY,
By CHAS. CROCKER,
Second Vice President.

[Southern Pacific Company Seal.]

Attest:

E. H. MILLER, JR., *Secretary.*

484 STATE OF OREGON,
County of Multnomah, ss:

Be it remembered that on this 21st day of October, A. D. 1889, before me the undersigned a Notary Public in and for said County

and State, personally came R. Koehler, Second Vice President of the Oregon and California Railroad Company, and George H. Andrews, Secretary of said Company, whose names are subscribed to the foregoing instrument as Second Vice President and Secretary pro tem. of said Company, both personally known to me to be the individuals who executed the said instrument, and they severally acknowledged to me that he the said Richard Koehler as Second Vice President, and he the said George H. Andrews, as Secretary pro tem. of the said Oregon and California Railroad Company, on the first day of July A. D. 1887, executed the foregoing instrument as and for the act and deed of said Corporation, for the uses and purposes therein mentioned; by authority of a resolution of the Board of Directors of said Corporation; and he, the said George H. Andrews, being by me duly sworn, did depose and say that he is the Secretary of said Company, and was, at the time of executing said instrument, the Secretary pro tem. of said Company; that he is and then was the legal custodian of, and is acquainted with, and then had, and now has, in his possession the Corporate Seal of said Company; that the seal affixed to the foregoing instrument as the Seal of said Company, is and then was, its Corporate Seal; that the same was so affixed by him as Secretary pro tem. of said Company on the 1st day of July, 1887, by order of the Board of Directors of said Company, and that he signed his name thereto by the like order of the Board of Directors of said Company.

In Testimony Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year first above written.

[SEAL.]

T. G. EVANS,

Notary Public.

485 Mr. KAVANAUGH: I object to this on the ground that it is incompetent, irrelevant and immaterial, and no authority in law for its execution—contains no evidence of the authority of the officers to execute it.

Court: It may be admitted subject to your objection.

Mr. KAVANAUGH: And further that the description is so indefinite as to be unintelligible, and I wish to save an exception to the Court's ruling.

Q. Mr. Koehler, I will ask you what the fact is as to whether or not the Oregon & California Railroad Company delivered the possession of the properties leased by this instrument to the Southern Pacific Company, and if so, when, and whether it was under that instrument.

A. Yes, the Oregon & California delivered—

Mr. KAVANAUGH: Formal objection to this. A possession of this property to the Southern Pacific Company except the lands—

Q. Land grants?

A. Grant by Act of Congress which had nothing to do with that lease.

Q. All of this relates then to rolling stock?

A. Yes.

Q. And all of its property except the land grants——

A. Yes.

Q. —was delivered under that date?

A. Yes, sir, and possession taken June 11, 1888.

Q. I will ask you to state to the Court whether or not ever since that time, the Southern Pacific Company has been in the possession of all of this property?

486 Mr. KAVANAUGH: If the Court please, the same objection to cover that. It is leading.

Q. Well what is the fact as to whether or not the company the Southern Pacific Company——

Mr. KAVANAUGH: That is still leading.

Mr. FENTON: I will submit the question.

COURT: Proceed.

Q. Well, didn't the Southern Pacific Company continue in possession of this property from the date you say under this lease, up to the present time?

A. It does.

Q. And are still in such possession?

A. Yes, it does.

Q. I will ask you to state to the court whether or not—what properties were delivered under this lease——

Mr. KAVANAUGH: Easy for the witness to answer.

Q. —have been occupied under the lease by the company and operated since.

A. You mean to enumerate the railroad lines?

Q. Yes, lines.

A. Well, it comprises the main line from Portland to the state line, the southern boundary of the state at or near Colman, comprises the West Side lines from Portland to Corvallis, also included the Yamhill division from Portland to Arlie and from Sheridan Junction to Sheridan. Also included the Woodburn branch from Woodburn to Natron, the Lebanon branch from Albany Junction to Lebanon, the Wendling branch from Springfield Junction to Wendling, together with all the rolling stock and all the other property belonging to the company except the land grant.

487 Q. What was the fact as to whether or not the Southern Pacific Company on July 1, 1887 owned or operated any railroad in Oregon of any kind prior to this lease?

Mr. KAVANAUGH: Objected to as incompetent, irrelevant and immaterial.

A. The Southern Pacific Company didn't operate any lines prior to July 1, 1887 in the State of Oregon.

Q. Did the Southern Pacific Company at that time or before own any railroad in the State of Oregon.

Mr. KAVANAUGH: Same objection.

A. It did not.

Mr. FENTON: The object of that, your Honor is to show under Section 5056 that they were not competing lines of the Southern Pacific Company and that the lease was therefore valid and authorized.

Q. Mr. Koehler, I would like to have you state to the court, if you can, what percent of the total cost of the construction, renewal, repair and maintenance of the lines on Fourth Street from the Union Depot or Glisan Street to Sheridan Street would cover the repairs, improvements, renewals and betterments required by Section 2 of Ordinance 599 referred to in this suit, which provides that the Railroad Company shall "grade to established grades, construct and maintain in good repair said street at least six feet in width upon each side of the center line of said street, and as much wider as may be affected by said railway or the construction thereof, and shall do and perform said work and the improvement and the repairing thereof, in such manner and as often as the City council of the City of Portland may at any time provide for or require", and any alterations of grades of streets required for laying said railroad track, and all improvements and repairs of the same for said purpose"—if you can give an intelligent estimate.

Mr. KAVANAUGH: I should like to hear the question read.
(Question read).

Mr. KAVANAUGH: I object as incompetent, irrelevant and immaterial, calling for the conclusion of the witness on a matter that absolutely is a legal conclusion.

Court: I think he can answer if he is able.

Mr. KAVANAUGH: Save an exception.

A. Going over my figures I find that of the \$160,314, which I have stated as my estimate of the total expenditures, the amount of \$80088 or 49.9 of the whole is that proportion of this expenditure which was required by the city by reason of maintaining the proper service of the street. I have not taken into this figure the cost of the seven inch rail which I rather think I am entitled to include, because we would not have laid this high rail were it not for the necessity of employing it or using it for the purpose of making secure the block pavement, and the iron guard rail which the city prescribed. Everything of that kind has been omitted. The amount involved is \$4724.

Q. What is the fact as to the city prescribing this guard rail, if you know, and when was that done?

A. It was prescribed in the ordinance under which this rail was laid and—

Mr. KAVANAUGH: That will be the best evidence.

Q. Do you know about when it was?

489 A. It was in 1902.

Mr. FENTON: Mr. Morrow, will you get the ordinance of 1902 of this city, requiring the company to put in this high guard rail.

A. It prescribes a seven inch rail and an iron guard rail.

Q. And that amount would be how much?

A. \$4724.

Q. I show you a document purporting to be a supplemental lease of August 1, 1893, of the Oregon & California Railroad Company to the Southern Pacific Company, and will ask you if you recognize the signatures of the various officers and of the various purported stockholders and of the trustees of the purported stockholders as being the genuine signatures of these various parties.

A. Yes, I recognize the signatures of all the parties who signed this document.

Q. And were they the respective parties they purported to be in that document at the time it was executed?

A. Yes, they were.

Q. What date is that instrument—August 1st?

A. Yes, August 1, 1893.

Mr. FENTON: I offer that instrument and ask leave to substitute a copy that is the modification of this lease, of July 1, 1887.

Mr. KAVANAUGH: Same objection as to the first lease. I don't know the description of the property and it is incompetent, irrelevant, and immaterial.

Objection overruled. Exception taken.

Marked Complainant's Exhibit X.

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COMPLAINANT'S EXHIBIT "X."

This Indenture, made and entered into this first day of August eighteen hundred and ninety three, by and between The Oregon and California Railroad Company, a corporation existing under the laws of the State of Oregon, party of the first part, and the Southern Pacific Company, a corporation existing under the laws of the State of Kentucky, party of the second part,

Witnesseth:

First. The party of the first part hereby leases to the party of the second part, for the period of thirty-four years from and including the date hereof, the railroads of the party of the first part in the State of Oregon, and also all the equipment and appurtenances of every kind and nature whatsoever thereto respectively belonging or appertaining.

Second. The party of the second part will pay to the party of the first part a fixed yearly rental for the premises so leased, amounting to the sum of five thousand dollars per annum, which rental shall be paid in four equal instalments of twelve hundred and fifty dollars each on the first days of February, May, August and November, of each year, during the pendency of this lease, (commencing on the first day of November, eighteen hundred and ninety three) it being understood and agreed that the amount of such rental, so far as requisite, shall be appropriated and applied by the party of the first part to the expenses of maintaining and keeping up its corporate organization under the laws of the State of Oregon.

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Third. The party of the second part is to operate the said leased railroads belonging to the party of the first part and shall, in the first place, out of the earnings and income derived therefrom, pay the cost of operating such railroads and the incidental expenses connected therewith, and likewise pay the taxes and assessments on the said demised premises, the cost of insurance thereof if and so far as effected, such amounts as it may become necessary to pay for damages to persons and property incurred in the course of operating the said leased railroads, or on account of land purchases heretofore made by or on behalf of said party of the first part, and the expenses of repairing, maintaining, improving, adding to and keeping up the said leased railroads, with all their appurtenances, and of maintaining, providing and keeping up in suitable condition and repair rolling stock and equipment for carrying on as economically and profitably as may be the transportation business of said leased railroads and so far as the same shall not be paid from rentals or income or proceeds of sale of lands, and the expenses of and connected with the lands of said party of the first part, and perfecting the title thereto, and payment of taxes and assessments thereon, and the expenses of and connected with its land department; and after the payments and deductions aforesaid, the said lessee shall apply the residue of the amount of the net income and earnings of said railroads, to such extent as shall be required for the purpose, to the payment of the interest and any sinking fund contributions from time to time becoming due and payable during the existence of this lease upon the now existing bonded indebtedness of the party of the first part, and such other bonded indebtedness of said party of the first part as may be created by said party of the first part with the assent of the party of the second part hereto.

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And it is further provided and agreed, by and between the parties hereto, that on the first day of May, in each year, during the continuance of this lease, the party of the second part shall pay to the party of the first part such balance, if any, of the net earnings or income received by the party of the second part from the said leased premises, with the appurtenances, for the year ending on the 31st day of December then next preceding, as shall remain in its hands after all the payments, expenses, deductions and advances and all the payments for interest and sinking fund contributions hereinbefore provided for or agreed or directed to be made, are paid. Provided, however, that if at the time, viz: such first day of May when such balance of such income or rental is provided to be paid to the party of the first part, there shall be any sum due or owing from the party of the first part to the party of the second part, for or in respect of advances or payments theretofore made by the party of the second part, or for new additions or improvements to the demised premises, or any part thereof, or for expenses of keeping up the corporate organization of the party of the first part, or maintaining agencies for the transfer of its stock and bonds, or for any expenses of its business or affairs, or for or in respect of any other sums which may have been lawfully advanced or paid by the lessee

to or for the party of the first part, the party of the second part shall be entitled to retain and pay to itself whatever may be
493 owing to it from the party of the first — for or in respect of any of the causes, or matters, or considerations aforesaid, including any interest which may be due or owing from the party of the first part to the party of the second part thereon. And provided, further, that if such balance of net earnings or income received by the party of the second part from the said leased premises, with the appurtenances, for any year, and which by the foregoing provisions hereof, would be and become payable by said party of the second part to said party of the first part, shall exceed the amount of seven per cent per annum upon the par value of the then existing preferred stock of the party of the first part, and six per cent upon the par value of the then existing common stock of said party of the first part, then and in that event the said party of the second part shall be entitled to and shall retain to itself for its own use any and all excess of such balance of net earnings and income over and above the amount of seven per cent per annum upon the par value of the then existing preferred stock, and six per cent per annum upon the par value of such then existing common stock of the party of the first part.

Fourth. It is further understood and agreed between the parties hereto that at the time when this lease shall go into operation, the party of the second part shall receive and be entitled to use and apply in the operations of the said demised premises, all fuel, rails and materials and supplies which shall then be on hand belonging to the party of the first part; and likewise to collect and receive all
494 sums which may be at that time due and owing to the party of the first part for freights and passage money, including all sums in the hands of agents or employees, or due from connecting roads, and likewise that the sums that may at such time be due or owing by the party of the first part for back wages of employees, and for fuel, rails and other materials and supplies for the business of said demised premises, or to connecting roads, or damages to persons or property in the operation of the road, or for other incidental expenses of the party of the first part, shall be paid by the party of the second part, and all the receipts and payments for and on account of such back freights and passage money and moneys in the hands of agents, employees or connecting roads, and for such back wages and debts for fuel, rails and other materials and supplies, and to connecting roads, and for damage to persons and property, and incidental expenses as aforesaid, shall be brought into and form part of the accounts of the party of the first part with the party of the second part hereunder for the year ending December 31st, 1893, in like manner and with like effect in all respects as if the same had accrued during that year.

Fifth. In case the amount of net earnings or income of the said demised premises applicable under the preceding provisions hereof to the payment of the current interest upon the bonded indebtedness of the party of the first part shall be insufficient in any year to pay in full such current interest for the year, it shall be optional with

the party of the second part whether or not to advance or pay for account of the party of the first part the amount of such deficiency, and if the party of the second part shall advance or pay for account of the party of the first part such deficiency, or any part thereof, it shall be entitled to interest at the rate of six per cent per annum upon such advances or payments until reimbursed therefor, and shall be entitled to repay itself for such advances or payments and interest at any time, or from time to time out of any subsequent earnings or income of said demised premises in the manner provided by the third article hereof in that behalf, and it shall have a lien therefor upon the demised premises, and the income thereof until such advances or payments, with interest thereon, shall be reimbursed; and in case the party of the second part shall at any time, or from time to time, make any advances to or for the party of the first part, for new additions or improvements of the demised premises, or any part thereof, or for the necessary expenses of keeping up the corporate organization of the party of the first part, or maintaining agencies for transfer of its stock and bonds, or for other incidental expenses not paid by the party of the second part under the lease, or for any other object or purpose, the party of the second part shall be entitled to receive interest upon all such advances at the rate of six per cent per annum from the making until the reimbursement thereof, and the party of the second part shall have a lien for such advances, and the interest thereon, upon the said demised premises and the income thereof until such advances are reimbursed, with interest, and the party of the second part shall be entitled at any time, and from time to time, to refund to itself such advances and interest out of any earnings or income of the demised premises which may be in its hands, unless it shall have been expressly agreed between the parties hereto to the contrary in writing at or before the making of such advances.

Sixth. The party of the second part will, when thereunto requested so to do by the party of the first part, guarantee the payment of the principal and interest of all bonds of the party of the first part which may have been, or may hereafter be issued under mortgage from the party of the first part to the Union Trust Company of New York, dated July 1, 1887, such guaranty to be substantially in the form following, viz:

"For value received, the Southern Pacific Company hereby guarantees the punctual payment of the principal of and interest upon this bond as therein provided, and agrees that the mortgage given to secure its payment shall have priority of lien upon the mortgaged property over its lien and claims thereon as lessee of the Oregon and California Railroad.

In witness whereof, the corporate seal of the said Southern Pacific Company is hereto affixed and attested by its Treasurer by order of the Board of Directors this thirty-first day of December, 1887.

Attest:

— — —, *Treasurer.*

Seventh. This indenture may be at any time modified in any of its terms or provisions or cancelled by agreement of the parties hereto.

In witness whereof, the party of the first part has caused these presents to be signed by its Second Vice-President and Secretary, and the party of the second part has caused the presents to be signed by its Vice President and Secretary, and both parties have caused their respective corporate seals to be hereunto affixed.

THE OREGON & CALIFORNIA RAILROAD CO.,

By R. KOEHLER, *Second Vice President.*

THE OREGON & CALIFORNIA RAILROAD CO.,

[SEAL.] By GEO. H. ANDREWS, *Secretary.*

SOUTHERN PACIFIC COMPANY,

By CHAS. F. CROCKER, *Vice President.*

SOUTHERN PACIFIC COMPANY,

[SEAL.] By G. L. LANSING, *Secretary.*

498 *Assent of the Preferred Stockholders of the Oregon and California Railroad Company to the Foregoing Agreement.*

We, the undersigned holders of the number of shares of the preferred stock of the Oregon and California Railroad Company opposite our names, which said number of shares is an absolute majority in amount of all the preferred stock of said company actually issued and outstanding, do hereby consent to, ratify and approve the execution of the foregoing instrument in manner and form as therein set out.

Names.	Number of shares.
Pacific Improvement Co., by F. T. Douty, Secy...	119,825 shares
F. T. Douty.....	5 shares
Charles F. Crocker.....	5 shares
H. E. Huntington.....	5 shares
R. Koehler.....	5 shares
Geo. H. Andrews.....	5 shares
W. W. Bretherton.....	5 shares

499 *Assent of the Trustees for the Holders of the Preferred Stock of the Oregon and California Railroad Company to the Foregoing Agreement.*

We, S. T. Gage, N. T. Smith and W. E. Brown, Trustees for the holders of the preferred stock of the Oregon and California Railroad Company, hereby consent to and approve the execution of the foregoing instrument in manner and form as therein set out.

N. T. SMITH.
W. E. BROWN.
S. T. GAGE.

500 Q. I show you an agreement audit No. 580, being an instrument of date March 4, 1897, purporting to be signed by the Oregon & California Railroad Company, and the Southern Pacific Company, and ask if you recognize these as the genuine signatures of the various officers that they purport to be?

A. Yes, I know all of those signatures.

Q. And they were such officers at the time they signed as such?

Mr. FENTON: I offer that.

Mr. KAVANAUGH: What is this?

Mr. FENTON: Modification of lease.

Mr. KAVANAUGH: Same objection as to the original lease.

Mr. FENTON: I ask leave to withdraw that and substitute a copy made by the official reporter.

Mr. KAVANAUGH: No objection to any order of that kind.

Marked Plaintiff's Exhibit Y.

501 COMPLAINANT'S EXHIBIT "Y."

Agreement Audit No. 580.

Between Southern Pacific Company and Oregon and California Railroad Company.

Nature.

Lease of Road to Southern Pacific Company, also amendment to same dated March 4, 1897.

Dated August 1, 1893.

Expires:

Remarks:

This agreement made and entered into this 4th day of March, A. D. 1897, by and between the Oregon & California Railroad Company, of the first part, and the Southern Pacific Company, of the second part

Witnesseth that whereas, heretofore and under date of August 1st, 1893, an agreement of lease was made and entered into by and between the parties hereto, wherein, among other things, it was provided that on the 1st day of May in each year during the continuance of said lease, the party of the second part should pay to the party of the first part such balance of the income or earnings of the leased premises, with the appurtenances, received by the party of the second part for the year ending on the 31st day of December then next preceding, as should remain in the hands of the party of the second part after the deduction of certain charges and expenses in said lease particularly set forth:

502 And whereas, it is to the convenience of both of said parties to change the dates of said accountings and settlements so as to conform to the reports required by the Interstate Commerce Commission

and other governmental bodies and officers, by adopting as a basis therefor a fiscal year ending June 30th, of each year, instead of December 31st as in said lease contemplated:

Now, therefore, it is hereby agreed by and between the parties hereto that the lease aforesaid be and the same hereby is modified and changed so that hereafter all said balances shall be paid on the first day of November of each year during its continuance, and shall be for and on account of the year ending on the 30th day of June then next preceding, except that in the first settlement which shall be made under this modification of said lease, to-wit, that on November 1st, 1897, such settlement shall be made upon an accounting for the whole period from January 1st, 1896, to June 30, 1897, both days inclusive.

It is understood by and between the parties hereto, that except as hereinbefore modified, said lease shall in all respects be and remain in full force and effect.

In witness whereof the said parties have caused these presents to be signed by their respective presidents or Vice Presidents, and Secretaries, under their several corporate seals, the day and year first above written.

[SEAL.]

OREGON AND CALIFORNIA RAILROAD
COMPANY,

By R. KOEHLER, *Second Vice President*;
GEO. H. ANDREWS, *Secretary*.

[SEAL.]

SOUTHERN PACIFIC COMPANY,
By CHAS. F. CROCKER, *Vice President*;
E. C. WRIGHT, *Secretary*.

503 Mr. FENTON: I also offer in evidence a certified copy of the Articles of Incorporation of the Southern Pacific Company, being Chapter 403, entitled "An Act to incorporate the Southern Pacific Company of the State of Kentucky".

Mr. KAVANAUGH: That is admitted.

Mr. FENTON: No, you deny. You admit the corporation for two years past, but you don't admit our powers.

Mr. KAVANAUGH: Same objection.

Objection overruled. Exception saved.

Mr. FENTON: I ask leave to withdraw our office copy and have the reporter make a copy.

Marked Complainant's Exhibit Z.

COMPLAINANT'S EX. Z.

An Act of the General Assembly of the State of Kentucky, Incorporating the Southern Pacific Company.

Approved March 17, 1884.

Amendment thereto, Approved March 21, 1888.

Chapter 403.

An Act to Incorporate the Southern Pacific Company.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That Henry D. McHenry, Wm. G. Duncan, Samuel E. Hill, Samuel M. Cox, Henry McHenry, Jr., and their associates and successors and assigns, be and they are hereby created and constituted a body corporate and politic, under the name of the Southern Pacific Company, and as such shall have perpetual succession, and be capable in law to purchase, grant, sell or receive, in trust or otherwise, all kinds of personal and real property to such amount as the directors of said company may, from time to time, determine; and to contract and be contracted with, sue and be sued, plead and be impleaded, appear and prosecute to final judgments all suits or actions at law or in equity in all courts and places; and to have and use a common seal, and to alter the same at pleasure; and to make and establish such by-laws, rules and regulations for the government of said company and the conduct of its business as said corporation or the stockholders therein shall deem expedient or necessary for the management of its affairs, not inconsistent with the constitution and laws of this State or of the United States; and generally to do and execute all acts, matters, and things which may be deemed necessary or convenient to carry into effect the powers and privileges herein granted; Provided, however, that said corporation shall not have the power to make joint stock with, lease, own, or operate any railroad within the State of Kentucky.

SEC. 2. The said corporation is hereby authorized and empowered to contract for, and acquire by purchase or otherwise, bonds, stocks, obligations, and securities of any corporation, company, or association now existing, or hereafter formed or constituted, and bonds, obligations and securities of any individuals, state, territory, government or local authorities whatsoever, and to enter into contracts with any corporation, company, or association, individuals, state, territory, government, or local authorities, in respect of their bonds, stock, obligations, and securities, or in respect of the construction, establishment, acquisition, owning, equipment, leasing, maintenance, or operation of any railroads, telegraphs, or steamship lines, or any public or private improvements, or any appurtenances thereof, in any State or Territory of the United States, or in any foreign coun-

try, and to buy, hold, sell, and deal in all kinds of public and private stocks, bonds, and securities, and said corporation may borrow and loan money, issue its own bonds or other evidences of indebtedness, and sell, negotiate and pledge the same, to such amounts, upon such terms, and in such manner as may from time to time be determined by the directors of said corporation; and it may mortgage all
506 or any part of its property, assets, and franchises to secure such bonds and the interest thereon, on such terms and conditions as shall on that behalf be prescribed by its board of directors.

SEC. 3. The capital stock of said corporation shall be one million dollars, divided into shares of one hundred dollars each; which shares shall be deemed personal property, and may be issued, transferred, and forfeited for non-payment in such manner as the board of directors of such corporation may determine; and no person shall in anywise be liable as a stockholder of said corporation after said capital stock to such amount of one million dollars shall have been paid in in cash, and a certificate to that effect signed and sworn to by the treasurer and a majority of the board of directors of said corporation shall have been filed in the office of the Secretary of State of this State; nor shall the said corporation, nor any of the officers or agents thereof, be thereafter bound to make any further returns or certificates: Provided, however, that if, after the payment of such capital stock any part thereof shall be withdrawn for or refunded to any of the stockholders when the property of the corporation is insufficient or will be thereby rendered insufficient for the payment of all its debts, the stockholder receiving the same shall be bound and obliged to repay to said corporation or its creditors the amount so withdrawn or refunded.

SEC. 4. Any two of the persons above named as corporators of said corporation may call the first meeting for the organization
507 of such corporation at such time and place as they may appoint, by mailing a proper notice of such meeting to each of such corporators at least ten days before the time appointed; and in case a majority of such corporators shall attend such meetings, either in person or by proxy, they may open books for subscriptions to its capital stock; and whenever five hundred thousand dollars shall be subscribed and ten per cent. of said subscriptions shall be paid in cash, the stockholders of said corporation may organize the same, and said corporation may proceed to business.

SEC. 5. Each share of stock entitle the holder thereof to one vote, in person or by proxy, at all meetings of the stockholders; the holders of a majority in interest of the capital stock, present in person or by proxy, shall constitute a quorum. The corporation shall have a lien on all the stock and property of its members invested therein for all debts due by them to said corporation, which lien may be enforced in such manner as the by-laws shall prescribe.

SEC. 6. The stock, property, and affairs of said corporation shall be managed by a board of directors of such number, not less than three, as may be from time to time determined by the corporators or stockholders. The directors shall be elected by the stockholders at such time and place, and in such manner, and for such terms, as

the stockholders shall from time to time determine. Meetings of directors or stockholders may be held within or without the State. No person shall be elected a director who is not a stockholder of the corporation. A majority of the directors shall constitute a quorum of said board for the transaction of business. The directors shall appoint from their own number a president, and they shall also appoint a clerk and treasurer, and such other officers and agents as they may deem proper, to hold their offices during the pleasure of the board. In case of a vacancy or vacancies in the board, the remaining directors may fill such vacancy or vacancies. The capital stock of said corporation may be increased from time to time to such sum as may be determined by the board of directors of said corporation, provided such increase or diminution shall be approved by at least two-thirds in interest of the stockholders of said corporation.

SEC. 7. The annual tax upon said corporation shall be the same as is now fixed by law for broker's license: Provided, that all property owned by said corporation and situated in the State shall pay the same State and local tax as is assessed upon similar property; and capital stock in said corporation, owned by citizens of the State, shall be assessed against the holders thereof as choses in action under the equalization law.

SEC. 8. The Company shall keep an office for the transaction of business, and the clerk or assistant clerk of said corporation shall reside within the State of Kentucky; but the said corporation may keep offices at such places outside of this State as in the judgment of its board of directors its business may from time to time require: Provided, that nothing herein contained shall be construed as granting any lottery or banking privileges.

SEC. 9. This act shall take effect immediately upon its passage.

CHAS. OFFUTT,

Speaker of the House of Representatives.

JAMES R. HINDMAN,

Speaker of the Senate.

Approved March 17, 1884.

J. PROCTOR KNOTT.

By the Governor:

JAS. A. MCKENZIE,

Secretary of State.

Chapter 601.

An Act to Amend "An Act to Incorporate the Southern Pacific Company," approved March Seventeenth, Eighteen Hundred and Eighty-four.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the Act entitled, "An Act to incorporate the

Southern Pacific Company", which was approved March seventeenth, eighteen hundred and eighty-four, be and the same is amended by adding to Section 1 thereof the following words, to wit: except subject to and in conformity with the provisions of the laws of the State of Kentucky applicable to railroads, and acquiring no special rights that may be possessed by any railroads in the state except the general and ordinary rights of common carriers as possessed by railroads generally.

SEC. 2. This Act shall take effect from its passage.

BEN JOHNSON,
Speaker of the House of Representatives.
 J. W. BRYAN,
Speaker of the Senate.

Approved March 21, 1888.

S. B. BUCKNER.

By the Governor:

GEO. M. ADAMS,
Sec'y of State.

510 STATE OF KENTUCKY:

OFFICE OF SECRETARY OF STATE,
 FRANKFORT, KY.

I, C. B. Hill, Secretary of State within and for the Commonwealth aforesaid, hereby certify that I have carefully compared the above and foregoing act of the General Assembly with the original on file in my office, whereof it purports to be a copy and that it is a true and correct copy of the same.

In testimony whereof I have hereunto set my hand and caused my official seal to be hereunto affixed. Done at Frankfort, this 20th day of June, 1900 and in the 109th year of the Commonwealth.

C. B. HILL,
Secretary of State.

[SEAL.]

By HARRY G. TANDY,
Assistant Secretary of State.

511 Mr. FENTON: I think that is all I care to offer.

Q. Mr. Koehler, I want to ask one question. Roughly speaking, what would you say was the average value per mile of this mileage of railroad from Portland to Corvallis?

A. Value?

Q. Yes, I mean as to the railroad per mile, minimum?

A. You mean cost of construction or cost of reproduction?

Q. Cost of reproduction or cost of construction, whichever way you care to put it. I want the minimum, not the maximum.

Mr. KAVANAUGH: Objected to as incompetent, irrelevant and immaterial.

Objection overruled and exception saved.

A. Well it is—I still do not fully understand the question.

Q. Well, I want to know what it would cost to reproduce a road from Portland to Corvallis, of the same general character of construction, weight of rail, general improvements, acquiring right of way—

A. As it now is?

Q. As it now is, as a minimum, not a maximum, but a minimum?

A. I should think at least \$35,000 a mile.

Mr. KAVANAUGH: Will you admit the testimony on the road outside of the city.

COURT: The counsel is proceeding on the theory that it is a continuation of the road, and has some bearing.

Mr. KAVANAUGH: I have no objection.

Q. You say not less than \$35,000?

A. \$35,000.

512 Q. How much?

A. \$35,000 per mile.

Recross-examination.

Q. Now, Mr. Koehler, do you know whether these documents are all the documents which the company has relating to these different transfers, sales and leases?

A. Well, I could not say.

Q. You don't really know what the documents are—all of them?

A. Well, I might say yes. I think I could if I had time to look them over, but I am not prepared to say that there may not be some other documents there concerning the transactions between some of the parties.

Q. Well, are there any other deeds or leases or important papers relating to it that haven't been introduced?

A. Not to my knowledge.

Q. You have estimated how much has been expended from G Street or Glisan Street, to Sheridan Street by the different improvements of the company. How do you estimate that—just a guess, is it not?

A. No.

Q. Well, then, will you tell us the method by which you have arrived at that?

A. Yes, I have put myself in the position as if I had to reconstruct what there was at certain periods, making due allowance for grading, if there was any to be done, for the materials, the various kinds, for laying the said material, for the purchase of the material which constitutes the covering, and its laying, for the wear and tear, for the maintenance of the track, and in that way I arrived

513 at these figures which I gave you.

Q. How long did it take you to make that calculation?

A. Well, it took me, I should think, about five or six hours, during one day and about three hours one night.

Q. Have you your figures with you prepared on all these different things?

A. Yes.

Q. Have you them with you?

A. I have a memorandum here, yes.

Q. Will you kindly tell us the process by which you got that?

A. Process? Do you wish to know the details?

Q. Yes, sir, I want to question you on the details, if you know now. I don't want estimates. I want figures. Estimates are not proper testimony.

A. Well, estimates—it cannot be anything but estimates.

Q. You don't know then how much was put in?

A. I have said——

Mr. FENTON: If the Court please, he called for the figures.

A. I said at the beginning that I made an estimate—that I could not produce the figures from the books because the books were burned up. If the books were there, it would be practicable to pick out each and every item that went to this \$160,000.

Q. Well, do you or do you not know what it cost—that improvement and repair?

A. I made an estimate of what I——

Q. Now, answer my question.

A. I could not know what it cost, because I wasn't there part of the time, and even if I did, for the time I was there, I would
514 not have the means now to recollect each and every item of expenditure by day's labor. That would be a physical impossibility for any one.

Q. A whole lot of the work done that you considered in your estimate, was hearsay, was it not? You didn't know it was put in of your own knowledge?

A. Well, it must have been done. The work shows for itself.

Q. Wasn't some of the work done and gone before you came here?

A. No, I don't think so.

Q. How could you tell about the grading?

A. As I said, I estimated that. You can go up on the street and——

Q. Do you know the original contour of the street?

A. You can follow that up at the present time, by the surface on the different blocks with the grade—the original grade.

Q. You don't know how much filling or taking off was on the blocks?

A. Why, a person could see it at present—the contour of the present grade of the street.

Q. You mean to say you can tell the original grade of that street from the present grade?

A. You could practically—you could see nearly by comparing the surface of the ground at both sides of the street with the blocks.

Q. Well, but the surface has been disturbed on both sides?

A. Some of it.

Q. All of it?

A. No.

Q. Is there a bit of the original surface between here and
515 Sheridan Street?

A. On the blocks, certainly.

Q. Where?

A. Up there. I think I could call a good many places in that line up along Sheridan Street and Lincoln Street, and there you can see that the houses are standing so much above the street. No body would have filled that up, if it was not the natural surface.

Q. They might have cut it down?

A. But they have not. I am satisfied of that.

Mr. KAVANAUGH: Well, then, if your Honor please, I move to strike out that testimony, because the witness does not know.

COURT: He does not pretend to testify to cost—simply gives an estimate.

Mr. KAVANAUGH: That is not valid testimony.

COURT: If he is competent to build railroads, and has built them, he has a right as an expert to testify.

Mr. KAVANAUGH: If the facts were within his own knowledge.

COURT: I think it can go in.

Mr. KAVANAUGH: I would like to save an exception to all his testimony of estimates.

516 Q. Counsel has called for your figures but has not asked you to produce them, but I wish you would read them to the court, if you have them in detail.

Mr. KAVANAUGH: I did not call for them, I asked if he had the figures. I never offered them.

COURT: You may read them.

Mr. KAVANAUGH: Save an exception.

A. The original construction, 1872, length 34 blocks, 260 feet, 8840 feet, equal 1.68 miles; Laid with 50# iron, 1.68 miles at 80 tons per mile, 134 tons; two fish plates per rail. 8840 x 2, divided by 24 (I would say here that of course these memoranda are in a great deal of detail; they might not be quite clear because they are really intended for my own use)—divided by 24 (that means 24 feet, the length of the rail) equals 756 plates; 1472 fish plates, six pounds a piece, 8832 pounds of steel, equals 4.43 tons, a total of \$138.43, at \$80.00 per ton, \$11,074.00. The bolts, four per rail, 2944¾ pounds, 2208 at 4¢, \$88.00; spikes, 48 per rail, 35,328 spikes at one-half pound, 17,664 pounds at 4¢, \$706.00; ties, 2600 per mile, or 1.68 miles times 2600, 4,368, 6"x8"x8", at 32 feet per tie, 139,736 feet at \$12.00, \$1677.00; Track laying, \$300.00 per mile; surfacing \$300.00 per mile on 1.68 miles, \$1008.00 planking 8840 feet, 12 feet, 3", 318,240 feet at \$16.00 laid, \$5091.00. Grading and culverts, estimated \$2500.00; Engineering, superintendence and installation, \$1000.00; total \$23,144.00. That is just the figure I gave you this morning, which I read off of this.

517 Q. Yes, I think so.

A. It is an awfully long paper.

Q. How many pages of your estimates have you? I mean of the figures, how much will they run, in addition to what you have read?

A. I read about two-thirds of a page. I have in addition to that page, one, two, three, four very closely written pages, with figures

showing all the details which made up the figures which I first gave when I was asked what I calculated the expenditures on Fourth street were for the railroad track and street improvements.

Q. I will ask this question—have your estimates and figures with reference to the balance of the total cost been made in this same way?

A. They have been made in the same way, except that, of course, as prices varied according to the time when the work was done.

Q. Were you familiar with the prices?

A. I was.

Q. Then I will ask you to state to the Court whether or not these estimates are based upon your actual prices of which you had knowledge, and based upon what was required to be done and was done according to your knowledge, and whether the figures are substantially accurate.

A. I made this estimate and figured the prices in accordance with my knowledge of what work and material cost at those times.

Q. Then these estimates that you speak of are in accordance with these figures?

A. Yes.

518 —. And I will ask you to state to the Court whether or not the amount of work which you have figured there is an estimate—is a computation of the amount that was required to do the work outlined.

A. It is an estimate of the amount of work required to create what was necessary in order to produce this track and these improvements on Fourth street at the various periods.

Q. I don't care for the rest of it.

Recross-examination.

Q. How much lumber was used in that street during this time, if you can give the total?

A. All of those times?

Q. Yes.

A. Well, I would have to pick that out here.

Q. At what different times was lumber put on there?

A. You mean all the lumber, also the ties?

Q. No, I just mean the planking.

A. Planking—there is the original planking, and then there is an estimate for a renewal of the planking from time to time on a basis of six years' duration—seven years' duration.

Q. Seven years' life of plank?

A. Yes, sir.

Q. How much planking was put down the first time?

A. There was put down 318240 feet.

Q. Where did you get those figures?

— 8840 feet, 12 feet, three inches thick.

Q. Where did you get the figures?

A. The length of the track.

519 Q. Was the planking all the way?

A. Yes.

Q. From Glisan street to Sheridan?

A. Yes.

Q. What was lumber worth then?

A. Twelve dollars per thousand.

Q. How do you know?

A. I know that from the books of the Company at that time.

Q. Then you don't know of your own knowledge?

A. Well, I have seen the accounts.

Q. You don't know whether they were correct?

A. Possibly may have been a falsification.

Q. When did you see the accounts?

A. I have seen the accounts at various times in the early days, when I had occasion and there was necessity of looking into the details.

Q. Who was the lumber purchased from?

A. That I could not tell you.

Q. Wouldn't you remember that just as distinctly as the price?

A. No.

Q. Why not?

A. I don't say that I know the price of this lumber put down.

Q. That is what I want to know.

A. I said that that was the price of lumber at the time when these roads were constructed.

Q. Twelve dollars per thousand?

A. Twelve dollars per thousand, yes.

Q. Did the price vary any during the construction?

A. During the construction?

Q. Or was the lumber price completely stable, during that 520 time.

A. I should think so. It was such a small period there would not be very much change in price.

Q. How do you know it is worth twelve dollars, and no more and no less?

A. As I said, I had occasion to look over the books of the company.

Q. When did you look over them?

A. Perhaps years afterwards.

Q. Are you just as well informed of the other details about what happened before you came in as you are on that?

A. I think I am tolerably well informed, yes.

Q. You could make estimates on any detail that had been done before you came here by your predecessor, the building of the road—carry them in your mind for thirty years?

A. Well, it just so happened that this lumber price was called to my attention.

Q. Who called it to your attention?

A. I mean it was fixed in my mind. I remember distinctly that the company's mills, I mean the mills on the east side, of the Oregon and California Railroad Company, was charged out at \$12.00.

Q. How long did that price continue?

A. That I cannot tell you.

Q. Well, was it six months or a year or nine months?

A. Well, I don't think that the prices at that time changed so very rapidly as they do now, because there was merely a local market.

Q. You don't think they do—you don't know whether—

A. I know—I know.

521 Q. You know that was the price? You say that you know absolutely that twelve dollars was the price they paid for the lumber at that time?

A. During the time of the construction of these roads—this west side road and the east side road, in the years 1870 to 1872, yes.

Q. They paid twelve dollars per thousand?

A. Yes.

Q. Who told you that?

A. As I said, I saw it in the books.

Q. What books?

A. The books of the Oregon and California Railroad.

Q. What particular book did you see it in.

A. An account book.

Q. And you have no hesitancy or difficulty in remembering that for thirty or forty years?

A. No.

Q. If they had you there they would not need any books at all, would they?

A. There would be mighty few details which I could supply.

Q. How much of it was laid—how much lumber was laid?

A. 380,240 feet?

Q. How much iron was laid?

A. 134 tons.

Q. Now, as a matter of fact, did the planking extend beyond College street, the first planking?

A. Yes, according to my impression.

Q. As a matter of fact it didn't, did it?

A. I don't—I think it did.

Q. Now, as a matter of fact, didn't the city of Portland do a lot of that grading itself on the track and street?

Mr. FENTON: On the track itself?

522 Mr. KAVANAUGH: Sure.

A. Well, I don't think the City of Portland ever did the grading required for the raising the tracks, that is the excavation for putting the ties in.

Q. I will ask whether or not it didn't do all the grading above Lincoln Street at its own expense.

A. I don't know. I wasn't here.

Q. Then how are you in a position to estimate these things?

A. I assume this as—

Q. You assume that; if that is not so, then the whole thing is knocked out.

A. No, because that does not mention the street grading.

Q. Well, the planking—if the planking didn't go further than College?

A. The planking or the railroad track?

Q. If the planking didn't go further than College.

A. If the planking didn't go further than College Street, then of course a certain portion of this \$5091.00 would have to be deducted.

Q. Yes. What grading—have you anything there for grading?

A. I have \$2500.00 for grading.

Q. On what do you base that?

A. Estimated.

Q. Pure guess?

A. Yes.

Q. You have nothing to guide you at all?

A. I should think that that would cover. I put it down that way—think that would cover the preparing of the road bed, even if the street had been graded before.

Q. Now, what are your other general items?

523 A. Well, we have rails.

Q. I don't care for details. Rails?

A. Rails.

Q. Do you know what they paid for rails at that time?

A. Yes, sir. There is one other peculiarity. I know that rails—iron rails—at that time cost \$80.00 per ton, delivered here.

Q. How many tons were there there?

A. There were 134 tons.

Q. You know what they paid for the other iron in setting the track?

A. Plates?

Q. Yes, plates.

A. Well, that is proportionate. I have been on the safe side and put them in at the same price as the iron rail was bought for, but as a matter of fact the fastenings, of course, commanded a higher price. I put them in at the same price—it doesn't cut much figure, and I thought I wanted to be on the safe side.

Q. What other general work was done—steel rails?

A. Beg pardon?

Q. Steel rails?

A. The steel rails? Later on the steel rails.

Q. Were they put in after you came?

A. They were put in after I came.

Q. You have a personal recollection of their cost?

A. Yes, sir. Those steel rail—the 50 pound rail, it was laid in 1882—was a remnant which was left over from the construction of the line from St. Joe to Corvallis. We paid for them \$42.00 per ton, and brought them from New York to Portland—was 524 \$12.00 per ton.

Q. Do you know what the ties cost in the original track?

A. I figured \$12.00 per thousand feet, cord measure.

Q. That is the same basis as you have been estimating?

A. For lumber.

Q. Now, what other items were there in your summary?

A. Well, that is—then there is in the summary—there is the work of ballasting at a later period of time.

Q. What period was that? Was that in your time?

A. Yes, that was in my time.

Q. Do you remember what that cost?

A. Yes, I have figured that ballasting at \$850.00 per mile. The surfacing at \$300.00 per mile, and the length of the line was—

Q. You have personal recollection of that—definite recollection?

A. I have.

Q. You think that all over the system, any place, if you would be called upon you could state exactly what the ballasting cost?

A. This is not what it cost—it is figured and estimated on what ballasting cost generally.

Q. You don't mean to say that this particular piece cost that?

A. No, I could not do that.

Mr. KAVANAUGH: I would like to renew my motion as to this testimony.

Court: You may have it on record.

Mr. KAVANAUGH: I think I have the right to make that motion.

Court: Oh, certainly.

525 Mr. KAVANAUGH: For the reason that he has no definite, personal knowledge of the things he testifies to and has admitted that the whole thing is only an estimate and not a fact.

Redirect examination:

Q. I would like to ask you one question, Mr. Koehler. Where was the heavy team traffic on Fourth street, lengthways, with reference to this track, when the company put in these plank improvements?

A. Well, they used largely the railroad track for teams, as the most convenient and best maintained part of the street.

Q. What effect did that have on wearing it out there?

A. It wore it out very rapidly.

Recross-examination:

Q. You spoke something about putting in crossings for street car lines?

A. Yes.

Q. You mention something of that. Did you put in the crossings for the street car company?

A. Well, we would. They were different, each crossing. I think there was different modes. In one instance I think the Glisan street line was put in by the owners of the street car line; the Washington street car line I think we furnished—we furnished the rails and they put them in.

Q. Didn't they furnish the rails on Washington Street?

A. No, because—I mean in the first crossings. Those crossings have been several times renewed.

Q. I mean the last crossing, when they put in that substantial track on Washington.

526 A. I really cannot tell you. There is only six hundred dollars in this estimate for these street crossings, for renewals.

I merely put this figure in because I found it in that other item, and I mentioned it in my own statement, before, that I didn't exactly know to what it referred.

Witness excused.

527 J. W. MORROW, a witness on behalf of Complainant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— What is your business, Mr. Morrow?

A. General tax and right of way agent for the Oregon Railroad and Navigation Company and the Southern Pacific Lines in Oregon.

Q. How long have you been tax and right of way agent of the Southern Pacific Lines in Oregon?

A. Since 1904, I think it was.

Q. Are you familiar with the location of the line of the Oregon and California Railroad Company, operated by the Southern Pacific Company, lessee, from the North line of Glisan Street and Formerly "G" Street in the City of Portland by way of Fourth Street through and out to Bertha?

A. Yes, I am.

Q. I show you a blue-print which for the purpose of identification may be marked Complainant's Exhibit "AA", and I will ask you to look at that document and state whether or not it is a fairly correct representation of the location of the track of the Oregon and California Company, the Southern Pacific Company, lessee, between the bounds mentioned, and the location of the respective donation land claims or additions to the City, and location of the City of Portland, the Chapman claim, the Lonsdale claim, the Stephen Coffin claim, and the Caruthers claim, and through Couch's Addition and
528 the water line of the Willamette River.

A. Yes, I have noted——

Mr. KAVANAUGH: I object to the same as leading.

The COURT: I think the question is leading. Let witness testify as to what he knows about this map.

A. Yes, I have reason to believe it is.

Q. Do you recognize it as a correct map of what it purports to be?

Mr. KAVANAUGH: That is not the question. You asked if "Reasonably" correct.

Mr. FENTON: I thought I would make it as easy as possible.

Mr. KAVANAUGH: I would like a definite location, if you have one.

Mr. FENTON: We offer this in evidence.

Mr. KAVANAUGH: I object because it does not appear to be a definite location.

The COURT: It is admitted subject to your objection.

Q. What does this red line show on this map, Complainant's Exhibit "AA" indicate?

A. That indicates the line of the West Side Division from Glean Street, from the station down here out to Bertha.

Q. I will ask you whether or not that is in accordance with its location on the ground?

A. It is.

529 Q. What—Are those lines here included in—What color do you call that, green?

A. Yes, I would call that green.

Q. Do you know what that is intended to represent?

A. That is to represent the boundary of Portland.

Q. I notice here the word "Caruthers" and trace on the line which is green at right angles with that addition the words; "South boundary of city in December, 1868."

A. That is as our records show it and the only information that I have or have undertaken to secure, that is Caruthers' Addition.

Q. I notice an addition on there known as the Portland Homestead in the James Terwilliger Donation Land Claim, and will ask you to state whether or not that is correctly located.

A. Yes, it is.

Q. And the same with reference to the addition called "Southern Portland."

A. Yes, sir.

Q. And Fulton Park?

A. And Fulton Park.

Q. Now, as tax agent of the Southern Pacific Lines in Oregon, have you—What are your duties with reference to the payment of taxes?

A. I take them up in a general way to see that the properties is assessed by the various county assessors, and pay the taxes on them.

Q. I show you a document purporting to be a certified copy of the assessment for the years 1905, '06, '07 and '08, of all the franchises, rights, privileges and grants, as granted by Ordinance 183, former City of East Portland, and Ordinance- No. 599, 2969, 510 as amended by Ordinance- 5442-11279, City of Portland, and will ask

530 you if all of these assessments were made and whether or not they were procured to be so made by the company or how they came to be made.

Mr. KAVANAUGH: I object to the question as incompetent, irrelevant and immaterial. The paper is not properly certified by any official.

The COURT: He hasn't shown the witness the paper.

Mr. KAVANAUGH: He said he was handing.

Mr. FENTON: I do not offer the paper; it is just a memorandum.

A. Yes, this represents an assessment made by the assessor of Multnomah County during Mr. Sigler's term as representing the valuing of franchises of the Southern Pacific Company within the city and made arbitrarily.

Q. During what years?

A. During the years 1905, 1906, 1907 and 1908, and has also made such an assessment for the present year.

Q. Now, who made this assessment?

A. Mr. Sigler, present county assessor.

Q. And is the—Hasn't the company been compelled to pay taxes on this assessment?

A. We have paid.

Mr. FENTON: Now, I am not clear, Your Honor, whether I can show by parole a collateral fact of this kind. The authorities some of them indicate that you may show the amount of the assessment where it is collateral; and I will ask the witness to state, using this memorandum, what the property mentioned has been assessed at, and then will follow that with a certified copy, if I can get one. The clerk disclaims authority to certify under the new laws.

Q. These rolls are in the custody of the sheriff and this certificate I have is from the duty sheriff. I will undertake to follow it up with what certified copies I can get and you can make your objection at that time. I would like to use this memorandum, and have you state what the assessment was and what property is covered.

Mr. KAVANAUGH: I object as not the best evidence.

The COURT: Mr. Fenton promises to make it competent.

A. In the year 1905 an assessment was made, the O. & C. Railroad Company on a valuation of \$20,000.00 on which we paid a tax of \$290.00. For the year 1906 it was assessed to the Southern Pacific Company's Lines in Oregon, at a valuation of \$25,000.00, upon which we paid an assessment of \$462.50. In 1907 it was assessed to the Southern Pacific Company Lines in Oregon at \$150,000, upon which we paid \$2,130.00 in taxes. In 1908 it was assessed to the Southern Pacific Lines in Oregon, at a valuation of \$150,000, upon which we paid a tax of \$3,000. In a general way I may state to you that the current year's assessment valuation has been made \$150,000.

Q. What property is covered by the assessment, and what is the description as it appears on the roll these years?

A. As it appears on the rolls for the year 1905, "All franchises, right, privilege and grant, as granted by Ordinance No. 183, former City of East Portland, and Ordinance- No. 599, No. 2969, No. 5100, as amended by Ordinance- No. 5442-11279 of City of Portland." There is no—apparently—No reference to these ordinances except from the year—Since the year 1905 until the year 1908 when they designate as being "All franchises, rights, privilege and grants, granted by City ordinance- 599 and 5100, and all franchises, rights, privilege and grants, as granted by the Oregon Legislature to the use of what is known as the public levee and former City of East Portland, Ordinance 183."

Q. To what does this Ordinance 183 relate, if you remember? What streets?

A. I don't—I do not know.

Q. You do not remember this East First Street?

A. I think it is, but I am not certain.

Q. This ordinance,—you cannot tell by reference to the number what part of the City?

A. No, except in a general way. I know that Mr. Sigler in assessing the franchise applies it to East First Street and Fourth Street and the public levee property in the South.

Q. Those three pieces of property?

A. Those three pieces of property. The claim that he makes is for the privilege or right of assessing as a franchise.

Q. Now, prior to the time that Mr. Sigler came into office, had these franchises ever been assessed to your knowledge?

A. Never.

Mr. FENTON: I offer this memorandum and ask leave to substitute a certified copy by the proper official.

Mr. KAVANAUGH: Objection.

533 Objection overruled; exception taken.
Marked Complainant's Exhibit "BB."

Statement of Franchise as Assessed on the Assessment and Tax Roll of Multnomah County against the Oregon & California Railway Co. and the Southern Pacific Lines in Oregon for the Years 1905 to 1908, inc.

Year.	Page.	Line.	To whom assessed.	Valuation.	Total tax.
1905.	6129.	38.	Oregon California Ry. Co.	\$20,000	\$290.00
1906.	6517.	20.	Southern Pacific Co. (Lines in Oregon).	\$25,000	\$462.50
1907.	6636.	24.	Southern Pacific Co. (Lines in Oregon).	\$150,000	\$2130.00
1908.	5062.	25.	Southern Pacific Co. (Lines in Oregon).	\$150,000	\$3000.00

All franchises, rights, privilege and grants as granted by City Ordinance #599 and #5100, and all franchises, rights, privilege and grants as granted by the Oregon Legislature to use of what is known as the Public Levee, and former City of East Portland ordinance #183.

I beg to certify that the above is an exact and true copy of the franchises against the Oregon & California Railway Co. and the Southern Pacific Co. (Lines in Oregon) as assessed on the Assessment and Tax Roll of Multnomah County for the years 1905 to 1908 inclusive.

S. B. MARTIN,
Chief Deputy.

534 Q. Was this map, Mr. Morrow, prepared under your supervision?

A. It was. The map is a blue print taken from a tracing which is in the engineering department.

Q. Of what company?

A. Of the Southern Pacific Company.

Q. State whether or not from the permanent official records of this office.

A. Yes, from the permanent official records.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Has this ever been checked over with the official records?

Mr. FENTON: I will produce a member of the engineering department to show it.

Q. I asked Mr. Morrow.

A. In what respect?

Q. Has this copy ever been checked over with the official records in the office of the engineer?

A. I do not know.

Q. You do not know how it would compare with the official plat?

A. No, sir.

Q. That is all.

Witness excused.

535 H. A. HAMPTON, a witness on behalf of the complainant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— I show you Plaintiff's exhibit AA, and will ask if you have seen that before.

A. Yes.

Q. Before going into it, I will ask you to state what your business is and what connection you have with Southern Pacific Company.

A. I am assistant engineer in the division engineer's office of the Southern Pacific.

Q. How long have you been connected with the company?

A. Since April, 1907.

Q. I will ask you to state to the Court what the fact is as to whether or not you have checked up that map, plaintiff's Exhibit "AA" with the official records of the company, as permanently carried in the engineer's office, and with the location on the ground.

A. Yes, I have checked up this map.

Q. What have you to say as to whether or not it is correct?

A. It represents the line as it is on the ground.

Q. And how does it compare with the permanent records of the company?

A. It is one of the permanent records;—A record map.

Q. This is a blue print, is it not?

536 A. It is taken from a tracing. Yes, it is a permanent record.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Do you know whether or not it has been checked up with the official record?

A. With the city records you mean? These maps are usually taken from the City plat. That is, so far——

Q. Do you know if this one has been, of your own knowledge.

A. Of my own knowledge, no, I do not. That is the usual custom. Witness excused.

537 J. W. MORROW recalled, for complainant testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Morrow, are you familiar with the value of rights of way between Sheridan Street in this city and Bertha, leading out through Southern Portland?

A. I think I am.

Q. What is the facts as to your experience in purchasing the rights of way for the various companies by whom you are employed?

A. Oh, I have had a considerable experience,—four or five years of it, and have purchased considerable.

Q. Is that a part of your business?

A. Yes, sir.

Q. You have shown on plaintiff's Exhibit AA the company acquired this right of way by conveyance South of Sheridan Street through the city out to Bertha? What is the fact, as to that?

A. Yes; on the map the red line represents the right of way and South of Sheridan Street it represents individual purchases.

Q. Have you made a computation of the right of way of the West side line of the Oregon and California Company here from Sheridan Street to Bertha?

A. Yes, I have.

538 Q. I show you this memorandum for the purpose of identification and it may be marked plaintiff's Exhibit "BB" and will ask you if those figures were made by you and based upon your knowledge of the values of that right of way?

A. Yes, sir.

Q. What would that right of way cost to acquire from Sheridan Street to Bertha where it is now located?

A. Well, not less than \$569,040.00.

Q. Have you made an examination of the ordinance covering street improvements affecting the Southern Pacific Company's lines on Fourth Street from the year 1900 to 1909, inclusive, from an examination of the records of the city?

A. Yes, sir, in a degree.

Q. I show you a memorandum and ask if that is the memorandum that you made which for the purpose of identification may be marked Plaintiff's Exhibit "CC."

A. Yes, sir, that is the one.

Q. Does this memorandum give the number of these ordinances?

A. It does.

Q. Did you make a search, or have a search made from 1900 to 1909?

A. Yes.

Q. That is the result of your search?

A. That is the result of my search.

Mr. FENTON: I offer in evidence certified copy of ordinance 12625, which passed the council March 19th, 1902, approved March 21, 1902; providing for the improvement of Fourth Street from the South line of Burnside Street to the North line of Jefferson Street, by grading to the proper subgrade and laying a pavement of wood blocks treated with Carbolineum Avenarius the full width of the roadway except the intersection of Washington and Morrison Streets with Fourth Street, and so much of the right of way of the Southern Pacific Railway Company as lies between a line twenty-one inches East of and parallel with the easterly rail of the Southern Pacific Railway Company's track on said Fourth Street, and a line twenty-one inches west of and parallel with the westerly rail of said track, and ask for time to get a certified copy. I haven't it here.

Marked Complainant's Exhibit "DD."

Mr. FENTON: I also offer in evidence Ordinance No. 12795, which passed the Common Council July 2, 1902, approved July 2, 1902, declaring the probable cost of improving Fourth Street from the south line of Burnside Street to the North line of Jefferson Street, assessing the same and directing an entry of such assessment in the docket of City liens, assessing the Oregon and California Railroad Company for its right of way the sum of \$2581.47, and ask time to prepare a certified copy.

Marked Complainant's Exhibit "EE."

Mr. FENTON: I also offer in evidence certified copy of Ordinance No. 12657, which passed the Common Council of the City of Portland, April 5, 1902, approved April 5, 1902, providing for the improvement by the Oregon and California Railroad Company of all that portion of Fourth Street from the South line of Burnside Street to the North line of Jefferson Street, which lies between two lines each six feet distant from and parallel with the center line of the track of the Oregon and California Railroad Company, by substituting for the present rails on said street full grooved steel rails not less than six inches high and weighing not less than eighty pounds to the yard, and by paving said space with wood blocks treated with Carbolineum Avenarius or creosote.

Marked Complainant's Exhibit "FF."

Mr. FENTON: I also offer in evidence Ordinance No. 12736, passed by the Council May 21, 1902, approved May 22, 1902, specifying

ing that the rails must be not less than seven inches high and weighing not less than eighty pounds to the yard, in combination with a guard rail attached thereto.

Marked Complainant's Exhibit "GG".

Mr. FENTON: I also offer in evidence Ordinance No. 13947, passed by the Common Council May 4, 1904, and approved May 6, 1904, requiring the improvement by removing the wooden blocks wherever worn out and decayed and replacing same with wood blocks laid on a sand cushion, etc.

Marked Complainant's Exhibit "HH."

Mr. FENTON: I also offer Ordinance No. 14186, which declares the cost of improving Fourth Street from the South line of Burnside Street to the South line of Glisan Street, and in which the Oregon and California Railroad Company is assessed \$179.36 as its share of the cost required to be paid by that company as its proportion, by the city.

Marked Complainant's Exhibit "II."

541 Q. Have you, Mr. Morrow, been able to get the number of the ordinance vacating North Fourth Street?

A. I have an order in for it; it is in the process of preparation.

Q. How is that?

A. I have an order in for a certified copy.

Mr. FENTON: I offer a certified copy of Ordinance No. 3479 vacating the North end of Fourth Street, so it may be used as a part of the terminal ground of the Northern Pacific Terminal Company to connect with the Oregon and California Railroad track on Fourth Street.

Mr. KAVANAUGH: I want to offer an objection as incompetent and irrelevant, and one also as having no bearing on the case at issue.

Objection overruled.

Exception taken.

Marked Complainant's Exhibit "JJ."

Mr. FENTON: I also desire to offer at this time, I haven't it here,

542 Your Honor, a certified copy of a map of 1866, approved by the City Council, and approving the Burrage survey, known,

I think, commonly as the Burrage map. I have an unofficial copy, but I want a certified copy from the plat with the dedication in connection therewith. They have denied any Fourth Street, Your Honor, in the pleading. (Previously designated "D.")

Q. One more question, Mr. Morrow. I will ask you what was the assessed value and the taxes paid independent of the franchise assessment on this 1.57 miles of railroad, rolling stock, belonging to the West side Division of the Oregon and California from Caruthers Street, to the junction of the track with the Northern Pacific at the Union Depot, from 1899 to 1908, inclusive, and if you are not able to state from memory, I show you a memorandum, and ask if you prepared the same and whether it is correct, or not.

A. Yes, sir, I prepared this memorandum and it is correct.

Q. What is the assessed value of that mileage during the time named, and the taxes paid?

A. Commencing with the year 1899, it was assessed to the Oregon and California Railroad Company, valuation \$6,939. upon which we paid a tax of \$249.82. 1900, assessed the same company, at a value of the same, upon which we paid tax of \$194.30. 1901, assessed to same company, valuation of \$8,493.70, upon which we paid a tax of \$230.69. In 1902 assessed to the same company, upon a valuation of \$8,493.70.

Mr. KAVANAUGH: Just a moment. What has this to do with the Southern Pacific?

Mr. FENTON: This is the Southern Pacific. We paid the tax.

543 Mr. KAVANAUGH: It is not assessed to the Southern Pacific.

Mr. FENTON: It was assessed to the lessors and paid by the lessee. It is the tax on the property, your Honor.

A. What is the last?

Q. 1902 is the last.

Mr. KAVANAUGH: What was that?

A. Valuation \$8493.70, upon which we paid a tax of \$296.60; 1903, valuation \$10205, upon which we paid a tax of \$395.95; 1904, valuation \$10,205.00, tax \$395.95; 1905, it was assessed to the Southern Pacific Co., Lines in Oregon, valuation \$20,410.00, tax \$287.07; 1906, Southern Pacific Co., Lines in Oregon, valuation \$20,410.00, tax, \$367.26; 1907, Southern Pacific Co., Lines in Oregon, valuation \$34,540.00, tax \$475.76; 1908, assessed to same company, valuation the same, tax \$670.08; valuation the same as 1907.

Mr. FENTON: That is all. I don't offer this memorandum.

Cross-examination.

Questions by Mr. KAVANAUGH:

— You are quite familiar with the valuation of railroad property and taxation in this district?

A. Fairly well, I think.

Q. Make it a study?

A. To a certain extent.

544 Q. You say that the right of way from Sheridan Street to Bertha is worth the sum of \$567,000?

A. Five hundred and whatever it was.

Q. \$567,000. Does your company pay taxes on that amount?

A. I do not know. I do not think they do.

Q. What taxes do you pay for that right of way?

A. Oh, we do not pay taxes on the right of way; we pay taxes on the roadbed as it exists, so much a mile. I don't remember, but I think the assessment out there is twenty to twenty-five thousand dollars a mile.

Q. How many miles is that?

A. I don't know as to that. Three or four miles, four or five, seven or eight,—something like that.

Q. Isn't it at least \$50,000, that you are assessed on that?

A. I cannot tell you. It is easy enough to find out by going to the records. It will give the exact facts.

Q. Now, the valuation is \$34,540.00 on this side of Sheridan Street?

A. Yes, the last valuation.

Q. Is that about the value?

A. It is the Multnomah County—That is about the value, Mr. Sigler has been assessing.

Q. I say is that the true value?

A. Oh, as to that, I don't know.

Q. Don't know what the true value is?

A. I do not know.

Q. How can you tell whether the taxation is proper if you do not know the value?

A. Well, we pay the assessment.

Q. Doesn't your taxation compute the true value?

A. Supposed to. That is a question of the assessor. If I
545 pay I am supposed to be satisfied.

Q. On what basis do you figure the valuation South of that?

A. I am not figuring values. My estimate there is the value,—what that right of way would cost to reproduce it.

Q. You work on the same basis when you come to figure the value of taxable property, wouldn't you?

A. I don't know that I could—

Q. The company would I suppose be willing to sell that for \$34,500.

A. I don't suppose they would sell it at all. I don't know as they have it for sale. I never heard any of the property was for sale.

Q. At all events that is all you have been assessed. That is the valuation that you paid on it?

A. Well, what do you mean? What I have been assessed at is the values I give you say for lines in this city. Yes, that is exactly it.

Q. I ask you what relation that bears to the true value of the line.

A. I don't know.

Q. What relation does \$567,000 bear to the true value of the line between Sheridan street and Bertha?

A. I think that, well—that is an estimate made upon what I considered to be the actual value of the property and in addition to this—

Q. How do you check up with values on that?

A. By going over the property in a general kind of way, and inquiring from different ones as to the value of certain tracts.

546 Q. How long since?

A. Very recently; within the last four or five days.

Q. Did you go over all the ground?

A. Well, practically all of it, and I walked over most of the line.

Q. How many people did you consult in getting the values?

A. Perhaps four or five.

Q. Are you prepared to say that it cost that full amount to get the right of way?

A. I certainly think it would cost that full amount if not a great deal more.

Witness excused.

47 Mr. FENTON: I think, your Honor, that the court will take judicial knowledge, perhaps, of the code of 1862, but it is a state statute and not a Federal statute, and therefore I offer from the code of 1862, second regular session, September, 1862, the Act Providing for private incorporation- and appropriation of private property therefor, consisting of 51 sections, which passed the House of Representatives October 13, 1862, Approved October 14th, 1862, by Gibbs, Governor, and will ask leave to have the official reporter copy it into the record so that I may withdraw this.
Marked Complainant's Exhibit "KK."

548

General Laws of Oregon.

(Reported by Code Commission.)

An Act Providing for Private Incorporations and the Appropriation of Private Property Therefor.

Private Incorporations.

General Provisions.

- Sec. 1. Three or more persons may incorporate themselves.
2. Articles of incorporation how made and filed.
 3. Articles to be evidence of corporation's existence.
 4. Articles, what they shall contain.
 5. Corporations, what are their powers.
 6. Corporations to receive stock, and call meeting for directors.
 7. Corporators to be inspectors of election, and who may vote.
 8. Qualifications of directors.
 9. Power of directors.
 10. Notice of meeting of stockholders.
 11. When directors elected. Majority may act.
 12. Corporations to keep stock-book.
 13. Stocks to be treated as personal property.
 14. Effect of sale of stocks.
 15. When directors liable for debts.
 16. Effect of non-user of corporate powers.
 17. Corporation may continue after dissolution.
 18. Special incorporations may incorporate themselves under this act, and effect of.
 19. Supplementary articles of incorporation.
 20. Corporations for navigating streams, may build roads across portages, who are prohibited from taking stock in corporation to build road.

549

Be it enacted by the Legislative Assembly of the State of Oregon as follows:

SECTION 1. Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act.

SEC. 2. Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgement of a deed; and file one of such articles in the office of the Secretary of State, another with the clerk of the county where the enterprise, business, pursuit or occupation, is proposed to be carried on, or the principal office or place of business is proposed to be located, and retain the third in the possession of the corporation.

SEC. 3. The articles of incorporation, or a certified copy of the one filed with the Secretary of State, or the county clerk, is evidence of the existence of such corporation.

SEC. 4. The articles of incorporation shall specify:

1. The name assumed by the corporation, and by which it shall be known, and the duration of the corporation, if limited;

2. The enterprise, business, pursuit, or occupation in which the corporation proposes to engage;

3. The place where the corporation proposes to have its principal office or place of business;

4. The amount of the capital stock of the corporation;

5. The amount of each share of such capital stock;

550 6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal or bridge, the termini of such navigation, road, canal, or the site of such bridge.

SEC. 5. Upon the making and filing of the articles of incorporation as herein provided, the persons subscribing the same are corporators; and authorized to carry into effect the object specified in the articles, in the manner provided in this act; and they and their successors, associates and assigns, by the name assumed in such articles, shall thereafter be deemed a body corporate with power:

1. To sue and be sued;

2. To contract and be contracted with;

3. To have and use a corporate seal, and the same to alter at pleasure;

4. To purchase, possess and dispose of such real and personal property as may be necessary and convenient, to carry into effect the object of the incorporation;

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation.

6. To make by-laws, not inconsistent with any existing law, for the transfer of its stock, the management of its property, and the general regulation of its affairs.

SEC. 6. The corporators, or any portion of them, designated by a

majority of the whole number, are authorized to open books and receive subscriptions to the capital stock of the corporation, and as soon as such capital stock has been subscribed, they shall give
551 notice to the subscribers to meet at such time and place as they may designate, for the purpose of electing, not less than three, nor more than seven directors, as the stockholders present shall determine.

SEC. 7. The corporators present at such meeting, shall be inspectors of the election, and certify who are elected directors, and appoint the time and place for their first meeting; and each stockholder who shall attend in person, or by proxy, appointed by writing, and subscribed by such stockholder, shall be entitled to one vote for each share of capital stock subscribed by him; but after such first election, of the directors, no person shall vote on any share, upon which any instalment, or portion thereof, is then due and unpaid.

SEC. 8. No person is eligible to the office of director, unless he is a stockholder in the corporation, and resident of the state, and a director ceasing to be such stockholder or resident, ceases to be a director. Before entering upon the discharge of their duties, the directors shall each take and subscribe an oath, to faithfully and honestly discharge such duties.

SEC. 9. The directors, when elected and qualified, at the first meeting thereafter, shall elect one of their number president, who shall preside at their meetings, and perform such other special duties as the directors may authorize, and at the same time shall appoint a secretary, whose duty it shall be to keep a fair and correct record of all the official business of the corporation. From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise specially provided in this act.

552 SEC. 10. The notice of the time and place of the first meeting of the stockholders for the election of directors, shall be given by publication of the same for thirty days before such meeting in some newspaper, published at least once a week, in the county where the meeting is to be held, or in some newspaper published in like manner, and in general circulation therein. All notices of subsequent meetings of stockholders or directors, shall be given for such time and in such manner as the directors may prescribe.

SEC. 11. There shall be an annual election of directors, and at each election after the first, the president of the corporation shall act as inspector of election, and certify who are elected directors. The directors chosen shall hold their offices for one year thereafter, and until their successors are elected and qualified. The powers vested in the directors may be exercised by a majority of them.

SEC. 12. Every corporation organized under this act, shall keep a stock-book, in such manner as to show intelligibly the original stockholders, their respective shares, the amount paid, and the amount due thereon, if any, and all transfers thereof, which stock-book, or a certified copy thereof, as to the items in this section specified, shall

be subject to the inspection, at all reasonable hours, of any person interested therein, and applying therefor.

SEC. 13. The stocks in all private corporations organized under this act, are to be deemed personal property, and subject to attachment, execution, levy and sale, as such; and the corporation
553 in case of such sale, is required to make the necessary transfer to the purchaser, upon the stock-book.

SEC. 14. All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder, or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance, due, or to become due, on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser.

SEC. 15. If the directors of a corporation declare and pay dividends, when the corporation is insolvent, or which renders it insolvent, or diminishes the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation, then existing, or incurred while they remain in office; or if such directors shall, by any official act or conduct, fraudulently induce any person to give credit to such corporation, they shall be liable in like manner to such person for any loss he may sustain thereby; but any director who voted against such dividend, or such fraudulent act or conduct, if present, or who thereafter as soon as the same came to his knowledge, filed his objections thereto, shall be exempt from such liability.

SEC. 16. Any corporation organized under this act, which does not elect directors and commence the transaction of the business for which it was formed, within one year from the time of the filing of the articles of incorporation, shall thenceforth be divested of its corporate powers, and if such corporation shall, for any period
554 of six months after the commencement of its business, neglect and cease to carry on the same, its corporate powers shall also cease.

SEC. 17. All corporations that expire by the limitation specified in their articles of incorporation, or are annulled for forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for the period of five years thereafter, if necessary, for the purpose of prosecuting or defending actions, suits or proceedings, by or against them, settling their business, disposing of their property, and dividing their capital stock; but not for the purpose of continuing their corporate business.

SEC. 18. The stockholders of any private incorporation heretofore incorporated by any special act of the legislature, may at any time hereafter, while such corporation exists, incorporate themselves under this act in the mode herein prescribed, for the purpose of carrying on the enterprise, business, pursuit, or occupation, for which they may have been specially incorporated; and the filing of the articles of incorporation shall be deemed a surrender of such special incorporation, but not of any vested right thereunder, and thereafter such

corporation shall have the powers and privileges, and be subject to the liabilities and limitations provided by this act, and not otherwise.

SEC. 19. Any corporation organized under the provisions of this act, may make and file supplementary articles of incorporation, to be subscribed by the then stockholders, of the corporation, for the purpose of increasing or diminishing the capital stock of such incorporation, or the amount of the shares thereof, or for the purpose of dissolving such corporation, and settling its business, and disposing of its property, and dividing its capital stock, provided, however, that the capital stock of any corporation formed under this act, except corporations formed for the purpose of making and constructing a railroad, shall never exceed the sum of two million of dollars, and any corporation that shall violate this provision of this act shall forfeit its corporate rights.

SEC. 20. Any corporation formed for the purpose of navigating any stream or other water, may, by virtue of such incorporation, construct any railroad, macademized road, plank road, or canal or bridges, necessary and convenient for the purpose of transporting freight or passengers across any portages on the line of such navigation, occasioned by any rapids or other obstructions to the navigation of such streams or other water in like manner and with like effect, as if such corporation had been specially formed for such purposes, but no corporation formed under this act, or heretofore or hereafter incorporated by any special act of incorporation, passed by the legislative assembly of this state, or otherwise for the purpose of navigating any stream or other water of this state, or forming the boundary thereof in whole or in part, nor any stockholder in such corporation, shall ever take or hold stock, or any interest directly or indirectly in the stock of any corporation which may be formed under this act, for the purpose of building or constructing any road in this act mentioned; nor shall any such corporation ever purchase, lease or in any way control such road or the corporate rights of such last named corporation; provided, further, that corporations heretofore incorporated, or which may hereafter be formed under this act for the purpose of establishing and keeping a ferry across any stream or other water of this state, or forming the boundary thereof, in whole or in part, shall not be deemed a corporation for the purpose of navigating such stream or water, within the meaning of this act, nor shall the stockholders thereof be restrained from taking or holding stock in a corporation formed under this act for the purpose of constructing or building any road.

Private Corporations.

TITLE I.

Appropriation of Land by Corporations.

SEC. 21. Corporations may enter upon lands to make selections.

22. What lands may be appropriated.

23. When corporation may change route of road.

24. How public highways or grounds may be appropriated.
25. How road located in towns.
26. When corporation may erect gate in town and when not.
27. Width of road and track.
28. Bridges across streams. When ferries may be put on.
29. Roads when completed to be common highway.
30. When tolls may be collected on road.
31. Effect of not paying, or overcharging toll.
32. Bridge to be common highway.
33. When tolls may be collected on bridge.
34. Corporation to construct railroad or canal to be common carriers.

SEC. 21. A corporation organized for the construction of any railroad, macadamized road, plank road, clay road, canal or bridge shall have a right to enter upon any land between the termini thereof, for the purpose of examining, locating and surveying the line of such road or canal, or the site of such bridge, doing no unnecessary damage thereby.

SEC. 22. Such corporation may appropriate so much of said land as may be necessary for the line of such road or canal, or
557 the site of such bridge, not exceeding sixty feet in width, besides a sufficient quantity thereof for toll houses, work shops, materials for construction, timber excepted, a right of way over the adjacent lands to enable such corporation to construct and repair its road, canal or bridge, and to make proper drains; and in the case of railroad, to appropriate sufficient quantity of such lands, in addition to that before specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct; but no such appropriation of private property shall be made, until compensation therefor be made to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement by such corporation, in the manner herein-after provided.

SEC. 23. Any corporation may change the grade or location of its road or canal, not departing from the general route specified in the articles of incorporation for the purpose of avoiding annoyances to public travel or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes, and for the accomplishment of such change, shall have the same right to enter upon, examine, survey and appropriate the necessary lands and materials, as in the original location and construction of such road or canal.

SEC. 24. When it shall be necessary or convenient in the location of any road herein mentioned, to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be,
558 unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used, and occupied by such

corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road.

SEC. 25. Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested such corporation may make such appropriation without reference thereto.

SEC. 26. Whenever such public highway or grounds is taken by a private corporation by agreement with the local authorities mentioned in section 24, such corporation may place such gates thereon, and charge and receive such tolls thereat, as such local authorities may consent to by such agreement, and none other; but when the same is appropriated without such agreement, as provided in section 25, such corporation shall not place any gate or other obstruction upon the public highway or grounds appropriated, nor charge or receive any toll from any person passing over or along the

same.

559 SEC. 27. Any road, other than a railroad, constructed by a corporation formed under this act, shall be cleared of standing timber for thirty feet in width of said road, and shall have a track in the center not less than sixteen feet wide, finished and kept in good travelling condition, except when the cutting on said road, is six feet or more deep on either side, in which case such track need not be more than ten feet wide, with turnouts of sixteen feet in width for every quarter of a mile of such narrow track.

SEC. 28. All streams or other waters upon the line of such roads, shall be safely and securely bridged, except where the county court of the county wherein the line of such road may cross such streams, or other water; or if such streams or other water from the boundary between two counties, then the county court of either of said counties may authorize the corporation to place a ferry-boat upon such stream or other water, to be kept and run for such toll as the county court may prescribe, and in the manner required of ferries established under the general statutes in relation to ferries; or except where such county court may authorize such corporation to connect their road with a ferry, now or hereafter established over such stream or other water under the general statute in relation to ferries.

560 SEC. 29. Whenever a road of any kind herein mentioned, other than a railroad, is completed, or any particular section of it fit for public travel, the corporation shall give notice thereof, by publication in some newspaper of general circulation, along the lines of such road or section, or by posting notices along the line of such road or section, or by posting notices along such line in some conspicuous places, not less than five miles apart, and thereafter such road or section thereof is a common highway, so that

every person with his stock and vehicles of every description may travel thereon upon the payment of the tolls prescribed by the corporation; subject to the power of the corporation by giving notice thereof in like manner to suspend such right of travel upon all or any portion of such road, for a reasonable time to enable it to make any necessary repairs or improvements thereon.

SEC. 30. A corporation shall only collect and receive toll on its road at a gate established thereon, and such shall be plainly and specifically printed or written upon a signboard, posted at such gate, in plain view of the travel on the road; but such corporation shall not establish any gate within the limits of any town, whether incorporated or not, or within one-half mile of the limits of such town, except as specially provided in section 26; but no person travelling on foot, or going in any manner, or with any property, from one part of his farm to another part, or going to or from church, funerals or elections, is liable to pay for travelling upon such roads.

SEC. 31. Any person travelling upon any road herein mentioned, who shall pass through a gate thereon, without paying the toll legally chargeable thereat, or who shall go round such gate, with intent to avoid the payment of such toll, shall be liable to the corporation for three times the amount thereof, and any corporation, which, by its agents or servants, or in any manner shall illegally collect any toll from any person travelling on such road, shall be liable to such persons for three times the amount thereof.

561 SEC. 32. Any bridge constructed by a corporation formed under this act, when completed and fit for public travel, and notice thereof is posted in some conspicuous place on such bridge, or by publication in a newspaper, as in the case of a road, is a common highway, within the meaning, and subject to the conditions specified in section 29, as to roads, and subject to the further power of the corporation to prescribe by advertisement in some conspicuous place on such bridge, the rate of speed any one may travel on such bridge.

SEC. 33. A corporation may collect and receive such tolls for crossing its bridge, as may be plainly written, or printed upon a signboard, posted in some conspicuous place on such bridge but no person not liable to pay toll on a road as provided in section 30, is liable to pay toll for crossing such bridge; and any person who shall pass over such bridge without paying the toll legally chargeable thereat, or any corporation which shall illegally collect any toll from any person crossing such bridge, shall be respectively liable to each other for three times the amount of such toll, as provided in section 31, in case of roads.

SEC. 34. Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe.

SEC. 35. It shall be the duty of every incorporation organized for the construction of any macadamized road, plank road, clay road or bridge, to keep an accurate statement or account of the
562 moneys expended by said corporation, in the construction of any such road or bridge, and keeping the same in repair, in-

cluding any sums paid for lands, appropriated as necessary for said corporation, which statement or account shall be verified at the time of the annual meeting held for the election of directors, by the president of the said corporation, or one of the directors thereof to the effect that he believes the said account to be just and correct, and a copy of such verified account shall within ten days after such annual election be deposited with the clerk of the county with whom the articles of incorporation are filed. Said corporation shall also keep an accurate account of the tolls received for travelling upon said road or bridge, or of other profits accruing to said corporation, which account shall be verified in like manner, and a copy thereof deposited with said county clerk within ten days after such annual election.

SEC. 36. At any time after the expiration of ten years from the time of taking tolls on any macadamized road, plank road, clay road or bridge, it shall be lawful for the county court of any county through which any such road or part thereof shall pass, or in which such bridge may be situated, to pay to such corporation the amount of money expended by it in the construction of such road or bridge, and keeping the same in repair, and all other necessary expenses, including any sums paid for lands appropriated by such corporation, together with interest on said account, and sums of money, at the rate of twenty per centum per annum, after deducting said amount the tolls and other profits annually received by said corporation, and after the payment of the amounts expended in constructing 563 and keeping in repair said road or bridge, and other necessary expenses incurred in and about the same, and interest thereon less the amount received by such corporation, the said road or bridge shall become free for public travel.

SEC. 37. The foregoing section shall not be construed so as to prohibit said county court at any time before the expiration of said period of ten years, from purchasing said road or bridge, for any sum that may be agreed upon by the said county court and corporation.

TITLE II.

Mode of Proceeding to Appropriate Lands.

SEC. 35. Corporation may maintain action for the appropriation of land.

36. To be commenced and proceeded as in ordinary cases.
37. Against whom commenced.
38. Complaint to describe land. Summons how served.
39. Substitution of landlord when action brought against tenant.
40. Answer what it may contain.
41. When view ordered.
42. Judgment appropriating land and effect thereof.
43. Appeal from judgment and effect of.
44. Costs and disbursements.
45. New trial.
46. Damages, disposition of.
47. Appropriation of private property to public uses, proceeding therein, as in this title.

SEC. 38. Whenever any corporations authorized as in the provisions of this act, to appropriate lands or right of way, is
564 unable to agree with the owner thereof as to the compensation to be paid therefor, or if such owner be absent from this state, such corporation may maintain an action in the circuit court of the proper county against such owner for the purpose of having such lands appropriated to its use, and for determining the compensation to be paid to such owner therefor.

SEC. 39. Such action shall be commenced and proceeded in to final determination in the same manner as an action at law, except as in this title otherwise specially provided.

SEC. 40. The action shall be commenced against the person in the actual possession of the land at the time, or if the property be not in actual possession of any one, then against the person acting as the owner thereof; or if there be no one in the actual possession, or acting as owner thereof, then against an owner unknown.

SEC. 41. The complaint shall describe the land sought to be appropriated, with convenient certainty. If the defendant, or either of several defendants, is a nonresident of this state, or unknown, service of the summons may be made by publication as in ordinary cases.

SEC. 42. A defendant in actual possession may, for answer, plead that he is in possession only as the tenant of another, naming him and his place of residence, if known and thereupon the landlord, if he apply therefor, shall be made defendant in place of the tenant, and *and* thereafter the action shall proceed in all cases as if originally commenced against him.

SEC. 43. The defendant in his answer may set forth any legal
565 defense to the appropriation of such lands, or any portion thereof; or omitting such defense, and aver the true value of the land in question, or the damage resulting from the appropriation thereof, or both.

SEC. 44. Upon the motion of either party, before the formation of the jury, the court, upon the request of either party, shall order a view of the lands in question, and upon the return of the jury, the evidence of the parties may be heard, and the verdict of the jury given.

SEC. 45. Upon the payment into court of the damages assessed by the jury, the court shall give judgment appropriating the lands in question to the corporation, and thereafter such lands are the property of such corporation.

SEC. 46. Neither party to this action may appeal from a judgment therein, in like manner and with like effect as in ordinary cases; but such appeal shall not stay the proceedings, so as to prevent such corporation from taking such lands into possession and using them for the purposes of the corporation.

SEC. 47. The costs and disbursements of the defendant shall be taxed by the clerk, and recovered off the corporation; but if it appear that such corporation tendered the defendant, before commencing the action, an amount equal to, or greater than that assessed by

the jury, in such case the corporation shall recover its costs and disbursements off the defendant.

SEC. 48. If any judgment in such action be reversed, and a new trial had, and at such second trial, the jury assess the damages of the defendant at a greater sum than before, the court shall in addition to the judgment appropriating the land as provided in section 42, give judgment in favor of the defendant for such excess.

SEC. 49. If the defendant accept the damages paid to the clerk, he receives his right of appeal, and if he do not, such sum shall remain in the control of the court, to abide the event of the appeal, and if the defendant or unknown owner of the land do not appear and claim the same, it shall be invested for the benefit of whom it may concern, as in case of unclaimed moneys in the sale and partition of lands.

SEC. 50. Whenever the law authorizes private real property to be appropriated to public uses, the same may be entered upon, examined, surveyed, and selected, in the mode prescribed by the statute giving such authority, and thereafter the state, county, or other municipal or public corporation therein, seeking and authorized to make such appropriation, may proceed in the mode in this title prescribed to have such property appropriated, and the compensation therefor determined and paid, and not otherwise; except that the compensation in the case of such state, county, or municipal or public corporation, is paid by the deposit in court of an order duly drawn upon the treasurer thereof, for the amount of such compensation.

SEC. 51. Owing to the necessity of certain corporations being formed under this act immediately, so as to commence operations before the winter rains set in, this act shall take effect and be in force from and after its approval by the governor.

Passed the House of Representatives October 13, 1862.

JOEL PALMER,
Speaker House Representatives.
WILSON BOWLBY,
President of the Senate.

Approved October 14, 1862.

ADDISON C. GIBBS,
Governor of Oregon.

567 Mr. FENTON: I also pleaded section 106 of the Charter of the City of Portland, approved January 23, 1903, and I am not certain whether it is denied or not. It is admitted?

Mr. KAVANAUGH: Substantially; we found some little errors in most of your quotations.

Mr. FENTON: I suppose the court will take judicial knowledge of the charter inasmuch as it is pleaded by title.

Mr. KAVANAUGH: The court takes judicial knowledge of the charter anyway.

Mr. FENTON: Then it is admitted; paragraph 12, section 106 is set out; if it is incorrect, it can be corrected by the official charter of

the city. I believe I have leave, your Honor, that I have leave to offer that map of definite location. I haven't it here.

COURT: It is understood.

Mr. FENTON: I may desire to offer for the convenience of the Court, a map showing the Beaverton Hillsboro Railroad, and connection in Fourth Street.

With that exception, we rest.

Mr. KAVANAUGH: I would like to have entered a motion for a non-suit in this case.

COURT: In an equity case?

Mr. KAVANAUGH: Yes. I don't care to argue it.

COURT: Just have it entered and that will save the question.

Complainant rests.

Defense move for non-suit.

568 L. F. SCHUBLE, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— You reside in the city of Portland, Mr. Schuble?

A. Yes, sir.

Q. Are you now employed in the office of the City Engineer of the City of Portland?

A. I am.

Q. What are your particular duties there?

A. Why I am a draughtsman, nothing else.

Q. Have you drawn this map of Fourth street?

A. Yes, sir.

Q. I will ask you to explain what that is.

A. Well, this is a map made from our plats of Fourth street.

Q. Of the official plats?

A. Yes, sir.

COURT: Mr. Kavanaugh, you spoke of official plats some time ago; was there an official plat of the city?

Mr. KAVANAUGH: Yes, in the office of the Engineer. It comes in sections.

Mr. FENTON: When you say "official" you mean so far as the city is concerned is official.

Mr. KAVANAUGH: It is the only official map I know. I suppose if you would run back through the County Court records you would get the official plats there.

COURT: The reason I inquired was that some years ago there was a case tried in the Supreme Court in which it seemed to develop
569 that there were no official plats of part of the city of Portland.

Mr. FENTON: As a matter of fact, Your Honor, the original city was dedicated by parole, and the City Council in 1866 authorized Burrage, the City Surveyor, to make a map and survey, and that was adopted and is filed of record in the Clerk's office.

Mr. KAVANAUGH:

Q. What part of Fourth street does that cover?

A. It shows a map of Fourth street from the Union Depot, or from Hoyt to Hooker.

Q. How much of Fourth street is shown where the railroads are?

A. Well, it shows the entire length of the street.

Q. Does that show the entire length of railroad?

A. Practically, yes.

Q. Shows all, and more, doesn't it?

A. It shows—

Q. Both ends, where it branches off?

A. Yes, up to the depot.

Q. And at that end where it leaves Fourth street?

A. Yes.

Q. What are these, Mr. Schuble, what are these figures at the intersection of the streets? What do they represent?

A. That is grade at the intersection, from our maps.

COURT: Grade of the railway?

A. Grade of the street.

Mr. KAVANAUGH: The railway is on the street grade?

A. I presume it is the same.

Q. Those are the several established grades of Fourth street?

A. The established grade, yes, sir.

570 COURT: A map was introduced yesterday with a street called South street; is that immediately South of College, or do you remember?

Mr. KAVANAUGH: As I saw it the other day on the map it seemed to me it was Lincoln street. There is Jackson street there (Indicating on map).

Mr. FENTON: If the Court please, I object to such portion of this map as lies south of Sheridan Street—as attempting to show any street from Sheridan to Hooker street, for the reason that there is no such street at that point, and this map here is not the official map.

Mr. KAVANAUGH: It is as near official as some you introduced.

COURT: You make that objection based on the testimony that you have given that you had a private right of way from that point south?

Mr. FENTON: Yes, and the official plats of the city will show no street is there from Sheridan to Hooker, although it is open and traveled.

Mr. KAVANAUGH: I desire to offer this in evidence.

COURT: It will be admitted, subject to Mr. Fenton's objection. Marked "Defendant's Exhibit 2."

Cross-examination.

Questions by Mr. FENTON:

— Mr. Schuble, you are deputy in the office of the City Surveyor?

A. In the City Engineer's.

Q. What is this tracing taken from?

A. It is taken from our quarter section sheets.

Q. What are they taken from?

A. They are made up from—they are made up from the additions and records as they come into the Engineer's office.

Q. Where do they come from, to the Engineer's office?

A. Well, I presume that when a plat is filed in the Court House we have copies of it—official copies of it.

Q. You have to go, then, to the County Clerk's office of this County to get all your official plats for the purpose of copying, to make a record?

A. To make our sheets.

Q. To make your sheets and to make the record in the office of the City Engineer?

A. Yes, sir.

Q. Mr. J. D. Morris is City Engineer at present?

A. Yes, sir.

Q. You are employed in his office?

A. Yes, sir.

Q. Where did you get the data to show that there was a Fourth street from Sheridan street south to Hooker street?

A. Well, that was taken off from one of our sheets that gives that quarter section.

Q. That is all you know about it?

A. That is all I know about it.

Q. You didn't make any original research to ascertain whether there was a street south of Sheridan street to Hooker Street, through which the tracks of the Oregon and California Railroad Company, and the Southern Pacific Company, lessee, now are run?

A. No.

Q. That is all.

Witness excused.

572 W. S. CHAPMAN, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— What is your name, please?

A. W. S. Chapman.

Q. Mr. Chapman, how long have you lived in the city of Portland?

A. Fifty-nine years.

Q. What relation were you to W. W. Chapman that laid out the town?

A. He is my father, I am his son.

Q. What is your business?

A. Civil Engineer.

Q. What experience have you had in municipal engineering in connection with surveying department of the city?

A. I first worked in the city in 1867, and I suppose I have spent

twenty years between that time and this in the City Engineer's Department.

Q. You are now in the City Engineer's office?

A. Yes, I am District Engineer, in the City Engineer's office.

Q. Was Fourth street opened through part of your father's claim?

A. Yes.

Q. Do you have a recollection of that part of the city which includes Fourth street prior to 1869?

A. Yes.

Q. And during January of that year when an ordinance was passed relating to the right of a railroad company to build a track there?

573 A. Yes, I was working in—I think I was Assistant City Surveyor at that time. I am acquainted with it.

Q. You remember distinctly the circumstances connected with it?

A. Yes, I do.

Q. I will ask you, Mr. Chapman, what was the condition of Fourth street at that time, with relation to its physical condition and the number of dwellings there, and other buildings along the street.

A. Well, it was improved by earth grade and had sidewalks laid on it from G Street, which is now Glisan, to Sherman street.

Court: What street, Sherman or Sheridan?

A. Sherman street, one block this side of Sheridan.

Q. Were there many buildings along the street at that time?

A. No, there were some residences, generally from one to three or four to the block.

Q. Small residences, or large, if you remember.

A. Well, I think none of them were very large. Would not be—would be considered very small today.

Q. Did you make any memorandum with relation to Fourth street prior to this suit?

A. Yes.

Q. I will hand you this map, or series of maps stuck together, for the purpose of refreshing your memory, and ask you whether you can tell the residences that were along there—erected along that street in 1869, when the ordinance was passed relating to the building of the railroad—January 6, 1869?

574 A. I remember a good many of the people who resided on the street, and know where a good many of them resided. Do you want me to—

Q. Then tell us where the residences were, if you remember.

A. Yes. I will start down with Glisan Street.

Q. Have you them marked on this map?

A. Yes, it has been marked. Mr. Taylor, who was City Engineer recently, and I went over it, and we marked down some that I didn't remember that he remembered.

Mr. FENTON: I think, Mr. Kavanaugh, you might ask him to testify as to what he remembers, then you can supplement it by Mr. Taylor.

Mr. KAVANAUGH: After your attention was drawn to these other residences did you remember it then?

A. Yes.

Mr. FENTON: That is all right.

Mr. KAVANAUGH: I will ask you to admit this in evidence.

Mr. FENTON: As a memorandum, Your Honor, it would not be competent.

A. I don't think we put in any on there above Clay street or Market street.

Mr. KAVANAUGH:

Q. Never attempted to put any on?

A. Very few,—no.

Mr. FENTON: I think I have no objection, Your Honor, to the offer.

Court: It is simply intended to take the place of Mr. Chapman's testimony as to who lived there.

Mr. FENTON: That is all you claim?

575 Mr. KAVANAUGH: Yes.

Mr. FENTON: I have no objection.

Map Marked "Defendant's Exhibit 3."

Q. Now, what was the general condition of that street at the time the grant to the railroad—the attempted or alleged grant, was made?

Mr. FENTON: You have not, as I understand, had Mr. Chapman swear that he lived on those streets to show that they were marked correctly.

Mr. KAVANAUGH: Well, are those markings correct, Mr. Chapman?

A. I think they are, pretty sure they are.

Q. Would be the same as you would testify to?

A. Would be the same as I would testify to.

The Court: The names are written on here, are they?

Mr. KAVANAUGH: Yes, the names of the owners of the dwellings along there.

A. People who dwelt there.

Mr. KAVANAUGH: People who dwelt there. For instance, Ainsworth's name would be written where he dwelt.

Mr. FENTON: Are those names all that you remember that lived on there, or are they the names of everybody who did live on there?

A. They are practically of everybody who lived there. You will see that it covers nearly all the ground up as far as the Sisters' School.

Mr. KAVANAUGH: He don't attempt to testify beyond that.

Mr. FENTON: All right.

Mr. KAVANAUGH:

576 Q. What was the condition of the street with relation to its surface and with relation to the number of residences along there?

A. The street had been graded and improved with sidewalks and

cross-walks, from Glisan street to Sherman street, and there were five or six dwellings on some of the—between some of the cross streets, and a lesser number as they came up town and away from the central part of the town. No business houses on Fourth street at that time. The stores were all, I believe, on Front and First in 1869.

Q. How were the sidewalks constructed?

A. Wood sidewalks, two-inch planks.

Q. Two planks, running lengthwise, or planks crossways?

A. I can't remember, but I think they were six feet in width, just the same as now.

Q. All the way out?

A. I think so.

Q. Were there any sewers in the streets?

A. No, no sewers laid until years after that.

Q. Cesspools at that time?

A. No, everything was surface drainage, excepting one or two places where they put in a box culvert under a big fill, and sometimes called that a sewer, but it should have been called a box culvert. No sewers.

Q. Any water mains along Fourth street?

A. I think there was. The Old Portland Water Works Company had a reservoir at Fourth and Market Streets. A man by the name of Greene.

Q. What is on that property now?

A. I think the city still owns it and uses it as a storehouse.

Q. In connection with the fire engine house?

A. No, I think on the northwest corner of Market and Fourth street, and the grade was lower and they put a roof over the reservoir and used it as a storehouse, or did, the last I knew, some years ago.

Q. Do you know how the grade of Fourth street, just prior to the time the track was laid, corresponds with the grade now?

A. Well, between Jefferson street and Harrison the grade was cut down in several places, in order to make it regular—to enable the railroad company to construct the road.

Q. Who cut it down, do you remember?

A. Railroad company.

Q. Did the city do any grading work along there, relating to building the road.

A. No, the city along that part of it—the city at the expense of the property owners had graded the street to the grade as it then existed, the established grade—then the railroad company found that it would be necessary to make an average grade from Jefferson street to Montgomery, or Harrison, up to the top of the hill, so they had to cut a number of streets lower from one to three or four feet, and they agreed—the railroad company agreed that if that was done they would cut the streets down and lower the sidewalks.

Q. That is cut Fourth street down?

A. Cut Fourth street down, and I think cut the streets between Third and Fifth, so that the property owners would not have any—

Q. Any extra work on the intersecting streets?

A. Yes.

Q. Do you remember the laying of the track?

A. Yes.

Q. Were you then in the city's employ?

A. Yes.

Q. Did you have anything to do particularly with the laying of that track, surveying the line, or anything of that kind?

578 A. I think we gave the grades of the street and that the railroad company graded it out and then they laid the track and then came the improvement with this plank road that has been mentioned, and I remember particularly that when we went to accept it—to construct it, we had to make it conform to the rails, which were ten inches above the established grade, because they had laid down six inch ties and put the rails on top.

Q. Didn't bury the ties?

A. Didn't bury the ties at that time, and then we put the sidewalks down to the proper grade, and we left the planks, which were about twenty feet long, rise up ten inches so as to conform with their railroad tracks, which was also planked. The ties were planked over, so it made one uniform plank road.

Q. Did the planks run at right angles to the road?

A. Yes, sir.

Q. How much of the street was planked, Mr. Chapman? The whole roadway?

A. The whole roadway, fifty feet outside the rails.

Q. Who planked that?

A. The city did. The planking was paid for by the property owners, except a certain amount in the middle of the street, which was paid for by the railroad company.

Q. Twelve feet?

A. Yes.

Q. Six feet on each side?

A. Over the ties the planking was laid lengthwise of the track. The roadway between the tracks and the curbs was laid at right angles to the track.

Q. How far did that planking extend, Mr. Campbell?

579 A. It extended——

Q. The first planking.

A. The first planking was from Glisan street to Jefferson street, then they laid another track from Jefferson to College very soon afterwards, so that it went in——

Q. From Glisan to College?

A. —From Glisan to College.

Q. Was there any planking laid at that time from College to Sheridan?

A. No, I think that was the extent of the planked road; from College up to Sheridan and eventually up to Sheridan it was broken stone or macadamized.

Q. What was the character of the ties and rails that were placed on that track?

A. Well, the ties were six by eight inches, eight feet long, fair timber.

Q. Rails light or——

A. I think they were four inches high, but I never——

Q. How does that compare with the ordinary rail now, lighter?

A. It is very light. Was a light rail. Was considered a pretty good rail at that time.

Q. Now, you remember the engines and cars that were first operated on that road? You have noticed them, have you?

A. Yes.

Q. How did they compare with the engines and cars that are operated on it now?

A. Well, the cars—the engines and the cars both, are much larger and much heavier. The traffic is much heavier, of course, than then.

Q. Rather light class of engines, were they not, at that time?

580 A. I think the freight car at that time between the terminals was an ordinary car, freight car. Then they got up a fifteen to twenty ton car—it was a pretty large car—years afterwards.

Q. Are you acquainted with the weight of the engines—do you remember the weight of those engines?

A. That I could not say.

Q. Well, was there any paving along there, other than you have mentioned, during those early years?

A. No.

Q. After that first surface planking wore out did they pave it, do you remember?

A. I think we first had macadam.

A. All along the street?

A. Yes, and then afterwards we put down block paving—wood block paving, which is still down on a good deal of the street.

Q. About how long after the construction of the road did Fourth street begin to come into a business street?

A. It was a good many years.

Q. Business kept down close to the river for a good many years?

A. Yes.

Q. You are familiar with Fourth street now?

A. Yes.

Q. Is it an important business street in the city?

A. Well, it is an important—one of the most important, if not the most important—it is one of the most important.

Q. How long have you been connected with the City Engineering Department, in your present employment?

581 A. Since 1904.

Q. Where is your office in the City Hall, Mr. Chapman?

A. It is on the——

Q. I mean your private office, where you do your private work.

A. My desk is on the Fifth street floor, but on the northeast corner next to the corner of Fourth and Madison street.

Q. Fifth street?

A. Yes, on the second floor of the City Hall, in the corner of the building next to Fourth and Madison street.

Q. That would be——

A. —the northeast corner of the building.

Q. Northeast corner of the building. How far is that office, measured laterally, from Fourth street?

A. About fifty feet.

Q. About fifty feet east of Fourth street?

A. Yes.

Q. What effect does the operating of cars and engines on the Fourth street track have in your office—what effect does it produce?

A. Well, it is a great amount of noise when the trains are going up the grade, so that if we are conversing we generally have to stop until the trains get past; if we are using the telephone we frequently have to tell the people that the trains are passing.

Q. Generally have to drop whatever business you are in; if you are conversing with anybody until the train gets by?

A. Yes.

Q. And would that be if the windows were down, as well as if up?

A. It is not so bad if the windows are down.

Q. Still has some effect at that time, does it?

A. Yes.

582 Q. What—does it jar the building, cause any vibration?

Mr. FENTON: I object to that as leading.

Mr. KAVANAUGH: Well, you led the witness with a halter all through this; you want me to take a shorter hold.

Mr. FENTON: I withdraw the objection.

Q. What have you to say with regard to the vibration?

A. Well, it is not very noticeable.

Q. In your office?

A. No.

Q. Now, on that map that you have introduced there, there is several blocks appear there where are no names of residents on it. Were they vacant according to your best recollection?

A. No, I think they were—that is the upper end?

Q. No, down where you started in.

A. I think that——

Q. There are some—you started here. Now, a block like that, going down—say starting in here, now this 149, 146, 147——

A. I don't remember; that is past Jefferson street, and I didn't remember, and I don't think that—I didn't put down because I didn't know. There were a few residences up there, but not very many, but I don't remember just where they were, but from Jefferson street down we filled it up pretty well. Some of those we didn't get on what they were.

Q. Do you remember now whether any of the blocks north of Jefferson street were vacant on the Fourth street side?

A. You mean the blocks on Fourth street?

Q. North of Jefferson, between Jefferson and Glisan.

A. No, I don't believe any of them were entirely vacant. It might

583 have been that the blocks was owned by people who lived on Third street, such as R. R. Thompson occupied a whole block. They had a very large house and had an entrance on the Fourth Street side. I think Ainsworth was the same way, but I think there was somebody living on every block, I should say. Might have been one or two exceptions but not very many, all told, at that time.

Cross-examination.

Questions by Mr. FENTON:

— Do you remember, Mr. Chapman, who lived on the corner of Fourth and Morrison where Mr. Steinbach's store is now situated at this time?

A. I think that S. D. Smith, at that time. They called him Muckamuck Smith to distinguish him from S. D. Smith who was called Put Smith.

Q. Do you remember W. J. Masters was born in the Masters home on that corner, now a man over forty years of age?

A. I thought Smith owned it because I know he owned it in later years and I knew that the Masters lived there or in that neighborhood, but I could not be sure just where they lived.

Q. But they lived on that block. Don't you recollect that Will Masters was born there?

A. I recollect that the Masters did, but where, I could not tell you—which street it was on. I knew in that neighborhood.

Q. Where was John C. Ainsworth—Captain Ainsworth's residence, as you remember?

A. Well, it was down between Oak and Pine.

Q. Oak and Pine and—

A. Third and Fourth.

Q. —Third and Fourth. He owned the whole block there, didn't he?

A. Yes.

584 Q. And his present—a part of his old residence has been moved away, moved north and now faces Fourth street, just north of the Lewis building being built, isn't it now, the old residence?

A. Well, I will not say about that. In fact, I have not had that in my mind for a long while.

Q. Well, that residence was occupied as a private residence until the construction of the building occupied on Third and Oak by the United States National Bank, was it not?

A. Well, I don't know just where it is now. Remember that he bought it. I think he had a corner across Oak street on which he built a stable or a barn which he afterwards turned into a residence and rented it.

Q. That is on Pine street now in the middle of the block?

A. I don't know.

Q. Do you remember the old Arlington Club?

A. Yes.

Q. Where was that—on Fourth street, wasn't it?

A. Well, I think so.

Q. Yes. Down in that same vicinity either in Mr. Thompson's residence or in Captain Ainsworth's residence.

A. Well, I should think it was in the Thompson residence.

Q. That is on Fourth street also?

A. Yes sir.

Q. Is that R. R. Thompson?

A. Yes.

Q. That was the block bounded between Third and Fourth and Pine and Oak, wasn't it?

A. Pine and Ash.

Q. Pine and Ash west of Fourth street?

A. No, it fronted on Third street. Third street was a prominent street away back in those days, that is, as a residence street.

585 Q. Now, Fourth street was his back door.

Q. But he had an entrance off Fourth street?

A. Yes.

Q. Now, St. Mary's Academy is where it now is, and where is that?

A. How is that?

Q. Where is St. Mary's Academy—on Fourth street now?

A. Where is it?

Q. Yes.

A. Between Market and Mill and Fourth and Fifth.

Q. And on the west side of Fourth?

A. Yes.

Q. Well, was that entrance to St. Mary's Academy as it has been since first built?

A. Well, the front entrance was always on Fourth street—from Fourth street, but I think that probably the more convenient entrance for people entitled to be in there was always on Fifth street.

Q. But as a matter of fact, they always made the entrance on Fourth street?

A. Yes.

Q. That was a boarding school for—

A. Girls.

Q. —girls. When was that put there?

A. Well, it was there in 1861 or 1862.

Q. It was there before the railroad was built?

A. Oh, yes, a long while.

Q. Now, the old office of the Portland Water Company owned by Leonard & Green was in that vicinity?

A. Well—

Q. The office of the Portland Water Company?

586 A. Office?

Q. Yes.

A. No.

Q. What was there?

A. The reservoir.

Q. Where was that?

A. That is right across Market street from St. Mary's College at the northeast corner.

Q. Now, where did Ben Holladay live with reference to Fourth street?

A. He lived at the southwest corner of Third and Stark and I think the lot extended clear back to Fourth street. They lived—Dr. Glisan built the house and Holladay afterwards purchased it.

Q. Do you remember where Joe Holladay lived?

A. No I don't.

Q. Do you remember he lived in a house fronted on Fourth street now occupied by Barnes Market?

A. I knew the house there, but I have forgotten.

Q. Wasn't that the old Ben Holladay property?

A. It was the Ben Holladay property, but Ben Holladay lived in a house right off the corner of Third and Stark—the corner lot, and then Campbell, one of whose daughters he afterwards married, he lived in the next house.

Q. Where Charles P. Bacon lived?

A. Yes.

Q. Is that now the present Chamber of Commerce?

A. Yes.

Q. That fronted on Fourth street?

A. No, on Third.

Q. Went through—Third to Fourth and had the whole block?

587 A. He had a half block.

Q. Captain Ainsworth, son of John C. Ainsworth, occupied the north half. George Ainsworth was a son of Captain Ainsworth?

A. Yes.

Q. Brother of the present John C. Ainsworth?

A. Yes.

Q. Didn't he live on the corner of Fourth and Oak, the quarter block?

A. I think that that building, if I remember right, was originally put up for a stable.

Q. And didn't Captain George Hoyt live on block 28 between Couch and Davis streets and Third and Fourth?

A. Yes sir.

Q. That is the father of Ralph Hoyt?

A. Yes.

Q. And didn't Dr. Wilson, father of Dr. George Wilson, and—

A. Dr. Glisan and Mr. Lewis—

Q. —they lived on that street too?

A. On Fourth street way down?

Q. And didn't Mr. C. H. Lewis also live on that street?

A. Yes.

Q. On the west side of Fourth street on Block 34?

A. Between D and E.

Q. Yes, and didn't Captain Flanders, father of the present J. C. Flanders—Couch Flanders, live on the west side of Fourth street and south side of Glisan?

A. Corner, yes.

Q. At a point practically where Fourth street ended in 1869?

A. Yes.

588 Q. Dr. Glisan lived on Block 33 on the west side of Fourth street, between Fourth and Fifth?

A. Yes.

Q. And Dr. Glisan was a son in law of Captain Couch?

A. Captain Couch.

Q. John H. Couch and father of the present Rodney L. Glisan.

A. Yes. I would like to say one thing, that I subscribed one hundred dollars and I think I paid it, toward the fund of one hundred thousand dollars that the people raised to pay the railroad company so that they would not cross the river up near Oswego and put the depot on that side, but would come down on this side and put the depot down here.

Q. Do you remember also the circumstance that Captain Couch donated ten blocks for location at that end?

A. Yes, I think that was counted as four thousand dollars toward the hundred thousand dollars.

Q. Well, don't you remember Mrs. Myrick, Captain Myrick, lived on block 67 on the west side of Fourth street and the old house still stands there?

A. I don't remember about the old house, but my understanding is they lived right on that block. We called that the skating rink. They afterwards had a skating rink. Once the roof fell in just before they were going to occupy it. They rebuilt it a few weeks after and some of the boys were having a meeting in it one Sunday night and somebody threw some gravel on the roof and one prominent citizen they state came out with the window sash around his neck.

Q. Do you remember the fact that D. W. Burnside lived on the quarter block on the west side of Fourth and the south side of Pine at the time?

A. Yes he did.

589 Q. And you will also remember the fact that J. W. Clark the saddler, had his home on the corner of Stark and the old buildings are still there?

A. Well, I know that he lived in that neighborhood. I think right there. I don't know about the old building.

Q. Mrs. Rosetta Sherlock lived next in an old building still there now?

A. Yes.

Q. I will ask you if you don't recall the Rosenblatt- living on block 48, on the east side of Fourth between Washington and Alder streets, where Lipman and Wolfe now have their annex?

A. Yes.

Q. That was the Rosenblatt home?

A. I am not positive of that, as I am of some of the others, but I knew the Rosenblatts—knew them fifty years.

Q. Do you remember the corner of Fourth and Morrison—the property now occupied by Gray's Clothing store?

A. Sol Blumauer used to be there.

Q. That old man, father of the Blumaues had his family residence there?

A. Yes.

Q. Now dead—died a year ago?

A. Yes.

Q. Father of the Blumauer boys here now?

A. Yes.

Q. That was his residence at that time?

A. Yes.

Q. Do you remember that Jacob Kamm lived on block 50, Third and Yamhill?

590 A. He lived at Yamhill.

Q. Third and Yamhill?

A. Yes.

Q. Where that three story block is opposite the Mohawk Building?

A. It is a little beyond the Mohawk.

Q. Across the street. You remember that George T. Myers lived on block 52 between Salmon and Taylor diagonally across from the court house, the old building is still there—just before you get to the Plaza.

A. Some old buildings are there, but I doubt being the ones he built.

Q. East side of Fourth street diagonally across from the court house?

A. Yes.

Q. Do you remember that Amory Holbrook lived on block 59 on a lot on the west side of Fourth, fifty feet south of Taylor street, between Taylor and Yamhill?

A. I am not so positive as to that there, but they were right alongside of Grooms.

Q. He was a lawyer, one of the old time lawyers here?

A. I think he was a councilman at one time.

Q. When was the court house on block 58 built?

A. I think in 1862, if I remember it.

Q. When was the city hall put on the property where it now is, known as block 56 between Madison and Jefferson?

A. That was put—I think that started in 1891—'90 or '91, and then a year or two afterwards they tore up the basement which had been built and rebuilt it in a different shape about 1902 or '93.

Q. Do you recall that was the property occupied by St. Helen's Hall before it was occupied by the city hall?

591 A. Yes.

Q. And St. Helen's Hall was a boarding school of the Episcopal Church for many years?

A. Yes sir.

Q. How long had it been there?

A. It was built previous to 1861.

Q. Was it occupied continuously up to the time the city bought the property?

A. Yes.

Q. And until they built out here on Cedar Hill?

A. Yes, I assisted very much in getting that block purchased for that purpose instead of a block at West Park and Burnside. It depended on Councilman Forbes' vote.

Q. Charlie Forbes?

A. Yes, and at one time he promised he would vote for that and I went and told him, I said, "You are in this end of town," and so he told them he would change his vote. That settled it.

Q. That was in what year?

A. Well, I suppose about 1890.

Q. That railroad had been down there at that time since 1871?

A. 1871, had been down there about 18 or 20 years.

Q. The St. Mary's Academy is on block 151, and you say that the building was there in 1860?

A. It was. Of course, they rebuilt the building and made it, I think, of brick, but they had the block there.

Q. It is still there and still maintained and operated as a boarding school for girls?

A. Yes, a prosperous institution.

Q. Now, as a matter of fact, wasn't Fourth street what you might call in the early day the residence street of the principal old families of the city of Portland—who have since been known to be old people of the city?

A. I don't think so.

Q. Where was the chief residence street?

A. Well, I would say that it was just as much on Third Street.

Q. You think the two were about the same?

A. Yes. Fourth street was a pretty nice street and Third street was, and any of those—of the more wealthy people really considered Third street—their residence on Third street and some of the back yards on Fourth street. At the same time, Fourth street was a nice street. It was a pretty nice street at that time. Pretty nice one to live on.

Q. I ask you to state, Mr. Chapman, if you know, when the first electric street car line was opened up in the city of Portland, that crossed over Morrison street.

A. First?

Q. About when? I don't suppose you can give the time exactly.

A. Well, no. I suppose it was in 1888 or '89. I remember I was superintendent of streets. Mr. Tyler Woodward was a member of the council and was the manager of the City and Suburban Line, the Third street line.

Q. It was then the Multnomah Street Railway?

A. No, it was the City and Suburban. The Washington street line was the Multnomah—then George and Jim Steele built the Second street line and they bought the electric street cars and were running them down that street at breakneck speed, so that Woodward whose line was run with horses and mules introduced a resolution, or made a report on them, reported that they were running pretty fast. I don't know but what I said the people would go across Third and go down to Second to get on those cars and that was '87, '88 or '89, along there somewhere.

Q. As a matter of fact, the electric lines had crossed Fourth street practically since 1888, hadn't they?

A. Well, now, as I say, I don't remember. I think the first line, electric line, I remember along about that time when they began to

build those cable cars—they had one up Third street, and Mr. Woodward told me, he said, "You bet I got in all right out there. I made them put their cable under our track and provided that when we put in cables, we should have the upper cable." I said, "Mr. Woodward, you will all have electricity in a short time." He said, "I don't know." I said, "You will be in the same way that Lynch was, who built the cable road now running down Jefferson Street. I told him, one day I was talking and I said 'Mr. Lynch, in two years you will be running these with electricity.' He laughed and said, 'Pahaw.'"

Q. And did——

A. And it was.

Q. That is the line to——

A. Up Jefferson.

Q. Up Jefferson to Portland Heights?

A. Well, it used to ran up by cable, be hauled up by cable from Chapman or Eighteenth street. Now it goes up Jefferson, it goes up Washington and goes around——

Q. But that old cable line went up Jefferson and left at the foot of what we used to call Goose Hollow.

A. Yes, left Jefferson Street.

594 Redirect examination:

Q. What *were* the character of the dwellings as to being frame or brick along Fourth street?

A. Well, they were of wood, some of them were frame and some of them were just box houses, all wooden buildings though.

Q. What was their height generally speaking?

A. Well, I say they were about a story and a half.

Q. Not very pretentious buildings?

A. No.

Q. What *were* their general size?

A. Well, about——

Q. Running from——

A. Generally they were about six or seven rooms. There were some on Third street, and some of the Ainsworths and those, who put up pretty nice buildings, but very few. Dr. McKinley put up a nice building by the court house, but very few. Generally pretty modest buildings at this date.

Q. St. Mary's Academy as it existed at the time this road was built was much smaller?

A. Yes, I think it was a wooden building only to accommodate a few pupils—I had—two little sisters of mine went there along about 1862. Then afterwards some nieces, a couple of nieces, but it was only a small wooden building at that time.

Q. When the court house was first built, was it built at its present size, Mr. Chapman?

A. No, no, it was a much smaller building.

Q. Additions put on afterwards?

A. Yes.

Q. At the time the road went through it wasn't as large a building as it is now, was it?

595 A. No, I think it was only about one-third or one-quarter as large as it is now.

Witness excused.

596 JOSEPH BUCHEL, a witness on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Buchtel, how long have you lived in the City of Portland?

A. Well, most of the time since 1852.

Q. Lived part of the time in East Portland?

A. Well, in Portland and East Portland; maybe I lived there longer than on this side.

Q. Were you living in Portland on this side of the river from 1865 to 1869?

A. Yes, sir.

Q. What was your business at that time?

A. Well, my business was photography—daguer-otyping and photography. Daguer-otyping was first, then afterwards photography.

Q. Do you remember whether you took a picture of the City of Portland in 1868?

A. Well, in answering that question I am going to answer it in this way. I was taking pictures of Portland from Robinson's Hill and from this high point near Montgomery several different years; I could not tell just positively for a number of years, for I made a great many pictures, some from Robinson's Hill, but most from this hill. They gave an angle so as to bring in the upper part of Row Island and the lower part—

Q. The picture on exhibit in the Oregon Historical Society
597 which purports to have been taken by you in 1868; this picture that I show you. Do you know if that is correct?

A. I couldn't tell you positively whether it is or not, because I made pictures of that kind several times. I do not know whether this is correct or not. I presume it is because I was making some large pictures. It is very difficult for me to see. I cannot see; I cannot see out of one eye at all and not very much out of the other.

The COURT: The same picture we had yesterday?

Mr. KAVANAUGH: No, a different one.

Q. "Portland, in 1868, photographed by Joseph Buchtel, a pioneer of 1852, presented by Geo. T. Meyers of Portland." The census of 1870 shows the population of Portland was 8347." That is on the tablet here. So far as you know, that is correct?

A. So far as I know.

Q. You recognize the picture?

A. Yes, I remember the picture. I took quite a number. I don't see this well enough to say as to what year. I wouldn't testify positively this was taken from Robinson's Hill. It might be taken from up here.

Q. This is a correct representation of the City of Portland at the time it was taken?

A. At the time it was taken—oh, yes, yes. I always took a good deal of pride in my pictures. They last.

Mr. KAVANAUGH: Yes, they last well.

598 Mr. KAVANAUGH: I would like to offer it in evidence, Your Honor, with the privilege of taking a photograph and returning it to Mr. Himes.

Marked Defendant's Exhibit 4.

Mr. FENTON: You cannot see this well enough to testify?

A. No, I cannot see well enough.

Mr. FENTON: Where did you get the item, 8347, as the population?

A. I didn't put that in.

Mr. FENTON: You do not think that is correct?

A. No, sir, I didn't put that in.

Mr. FENTON: It is stated here by the census of 1870, the population of Portland was 8347.

A. That was probably by Mr. Meyer himself.

Mr. FENTON: You don't know what it was by the census?

A. No.

Mr. KAVANAUGH: I did not intend to bind anybody by that.

Q. Now, could you say that Portland in 1869, the early part of 1869, was approximately what that picture shows here?

A. I think so. My best impression as near as I can say, that is a correct showing. That is Ross's Island showing the lower part, being in sections matched together.

Cross-examination.

Questions by Mr. FENTON:

— I will ask Mr. Buchtel how old he is at the present time?

A. You want me to answer the question?

599 Q. Yes.

A. I am seventy-nine years past. Seventy-nine the 22nd of this month, or last month, November.

Redirect examination.

Questions by Mr. KAVANAUGH:

Q. Do you remember the condition and situation of Fourth Street at the time just before the road was built on there, Mr. Buchtel?

A. The railroad?

Q. Yes.

A. Oh, I am somewhat familiar with it, yes.

Q. What was the general character of it as to being a business street or not business street.

A. It wasn't considered a business street at all.

Q. Residences scattered here and there along?

A. Yes, sir.

Q. Where was the business done at that time?

A. Oh, on First and Second Streets, gradually back to Third.

Q. Front?

A. Yes, sir, Front.

Q. What was the chief business street of the City for a great many years?

A. Well, Front Street was and First afterwards, for a long time.

Q. And between what other streets North and South was the principal business district along about that time?

A. Let's see; I think possibly Davis and Jefferson.

Q. Davis and Jefferson?

A. Yes, sir.

Q. Was the district down in where the Central Depot stands, now known as the Union Depot—was that much built up?

600 A. Where the union depot is?

Q. Yes.

A. That wasn't built up at all. That was practically what is known as Couch's lake. Practically nothing in there.

Q. How was East Portland at that time, was that built up?

A. There wasn't any East Portland, practically. A few dozen houses.

No recross-examination.

Witness excused.

601 GEORGE H. HIMES, a witness called on behalf of the defense, having been previously sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— You have been already sworn in this matter?

A. Yes, sir.

Q. I hand you a photograph here, Mr. Himes, and ask you to state what property and buildings that represents, and when it was taken.

A. Well, the information about this picture as to date it was taken, I get from the party from whom I got it, Mrs. Richard Williams. She says, taken in 1867 by Mr. Buchtel and the location of the picture is the present site of the City Hall, Portland. This picture,—these buildings are the buildings that were upon the present site of the City Hall and the buildings—this building here was the residence of Bishop Scott, the Episcopal Bishop of Oregon; the building on that corner is what is known as St. Stevens' Chapel, facing Fourth Street between Madison and Jefferson.

Q. On the West side of Fourth?

A. The West side of Fourth, between Madison and Jefferson and this corner house there, was the residence of Captain Charles Holman, now deceased, the brother of the undertaker.

Mr. KAVANAUGH: I will ask Mr. Buchtel, before he goes, if he remembers taking that picture.

602 Mr. BUCHEL: From the description, yes. I lived in the Scott house formerly known as the Comfort House. The square house. That was built afterwards on the corner by Bishop Scott, and as Mr. Himes says, the next building on that same street was Charles Holman's.

Mr. KAVANAUGH: Do you know when St. Helen's Hall was put there on that block?

Mr. BUCHEL: That is what I forget.

Mr. KAVANAUGH: St. Stevens' Chapel was afterwards St. Helen's Hall?

A. (by HIMES). I can answer that question. It was built in 1870. Bishop Morris was the successor of Bishop Scott and, of course, this property was, I think technically called Diocesan property and Bishop Morris succeeded to the management of that following Bishop Scott and he at once began the erection of St. Helen's Hall, immediately after his arrival, which was in 1869, and built into St. Helen's Hall a part of the original Bishop Scott house, and as the school building was erected, this was raised up one story and faced on Jefferson Street and the upper room used as a chapel, I believe. No, if I remember right, the lower for a chapel and the upper for a school-room.

Mr. KAVANAUGH: I would like to offer this in evidence.

Marked Defendant's Exhibit "5".

603 Mr. KAVANAUGH: The road was not built in 1869.

Mr. FENTON: Five miles was built the first year or so.

Cross-examination.

Questions by Mr. FENTON:

— Mr. Himes, when was St. Helen's Hall occupied as a school for the Episcopal children and those who desired to patronize it, on that block where the City Hall now stands?

A. Bishop Morris began school in this particular building here in 1869. He arrived in 1869 and he began school work immediately. While the school work was going on in this building, he was preparing for the other.

Q. He afterwards built the wooden building that covered practically all of that block?

A. Yes.

Q. When was that built and occupied?

A. I think in 1870.

Q. That is to say, in 1870 that block where the present City Hall is, as shown in that photograph, and which was formerly occupied as a residence of the Episcopal Bishop, Bishop Scott; was built covering the whole block as early as 1870?

A. Yes, substantially. Although the building occupied a substantial portion of the block, there was quite a space for the campus.

Q. Was it two story or three story?

A. I think two story. If I might be permitted I might say, I have a catalogue. I printed the first catalogue of St. Helen's Hall.

Q. Roughly speaking, about what number did patronize—

A. On that catalogue is a picture of the new building.

Q. That was occupied as a school for young ladies, or a seminary for young ladies, and operated under the auspices of the
604 Episcopal Church from 1870 down to the time they removed to Cedar Hill, the present site of St. Helen's Hall. Do you remember when that was they left there?

A. Let me see. Fourteen—fifteen,—it was about sixteen years ago. Of course, I can give you the date exactly—

Q. That is approximately correct, is it?

A. Approximately correct. I have the date to—

Q. This school was a boarding school for girls; and how many, about, was the average attendance would you say?

A. Well, it is purely guess-work. Well,—say seventy-five.

Q. Yes.

A. Of course, I could tell accurately by referring to the catalogue.

Q. Do you remember the Nesbit girls, Mrs. McArthur and Mrs. Ankeny were educated there?

A. Yes, sir, I had a sister there also.

Witness excused.

605 J. W. CURRAN, a witness called on behalf of the defence, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Where do you reside?

A. On Fourth street off College.

Q. How long have you resided there?

A. About, well,—24 or 25 years, I think, in that neighborhood.

Q. Does your house face on Fourth Street?

A. Yes sir.

Q. You hear the train passing there once in a while?

A. Slightly. yes, sir, slightly.

Q. Will you explain to the Court what you mean by "Slightly", and what effect it has on your residence, and home?

A. It jars everything in the house and shakes the bed that we lie on.

Q. What about noise?

A. Well, you couldn't talk or converse at all unless you yelled in a person's ear while the train is passing.

Q. How far is your residence—the basement line of your residence from the Street or the line of your building?

A. It is about eight or ten feet I guess from the inside curb.

Q. Pretty close out, is it?

A. Yes sir.

Q. And does it cause—state to the Court whether or not it causes

you, and people similarly situated discomfort and annoyance.

606 A. Oh, fearful, yes, sir,—very much. You cannot leave windows up at all. The bedding or the bed-clothes, the floors and carpets and nothing that is not covered with soot all the time, especially if the wind is blowing in that direction. I have been irritated and annoyed in different ways by my wife and daughter saying, "Oh what will we do with this thing going on." "When will we get rid of this nuisance?" If you throw the windows up to air the house and happen to forget, if you hear the train you go at once, knowing the result; but if you forget, the place is covered with soot all the time. It would make anybody—

Q. When does it start? Early in the morning?

A. The first train goes up there this season of the year before daylight, there,—a little after seven—a few minutes—I do not know—a few minutes,—half an hour,—the train leaves about six—a freight generally.

Q. Is there any chance to sleep while that train is passing?

A. I can sleep. None of the rest can. My wife cannot sleep at all. I can turn over and sleep again in five minutes.

Q. After passing?

A. Yes.

Q. While it is passing?

A. No, sir, it wakens me up.

Q. How much vibration does it cause the house then? Does it shake it?

607 A. Yes, sir, it trembles just like that (Indicating).

Q. Shake fixtures on the lamps and gas?

A. Yes, and has broken globe after globe. And our flats—our own flats above that and one of our tenants I hear has put—

Mr. FENTON: I object to that as hearsay.

A. My wife says five dollars—

Mr. FENTON: I move to strike that out as hearsay.

Q. Do you know what effect it has on the mantels they use on the gas lights,—these little paper mantels?

A. Yes, sir, it breaks them.

Q. Destroys them?

A. Yes, sir.

Q. What lot, Mr. Curran, and what block is your residence on?

A. I don't know the block.

Q. What size is the piece of ground?

A. 50 x 106, I think.

Q. Which side of Fourth Street is it?

A. East side.

Q. Facing the East?

A. Facing West.

Q. When did you buy it?

A. I bought it from D. C. Lewis,—oh, I don't know the year. I came to Portland in 1873. D. C. Lewis his wife or himself was a cousin of my first wife and wanted us to build there. I objected to

building unless she would put a price on this lot. Mrs. Lewis was a very nice lady but I understood could not write. I never saw her hand-write. That is, Dave C. Lewis' wife. Never signed a deed in her life. An uneducated woman. Whether she ever put
608 her name to paper, I don't know, or her mark either. She wouldn't sign. "You build there" they said, "So that we can have an opening in our fence". They then lived in their old house on the second house, situated on Fourth Street, the second house above College. That was their home before Mann built the present house, and after I built a fence there,—they had no fence. I built a fence there and left a gate there so that they could pass into each others' back yards.

Q. So they could be neighbors?

A. Yes, sir.

Q. What did you pay for the lot?

A. I paid a few years later \$2250.00 which was \$500. to \$750. more than it was worth at that time.

Q. More than it was worth?

A. \$750.00 more than I considered it worth, because I was foolish enough to build without a deed.

Q. Well, did you build a house on it?

A. I did, sir, I had it built.

Q. What did the house cost you?

A. Well, I couldn't tell you exactly.

Q. Well, approximately.

A. About \$2850 I think, sir.

Q. Is it a frame house?

A. Yes, sir.

Q. Two story, one story?

A. Two story.

Q. How many rooms?

A. There is one, two, three and a bathroom upstairs, and three and a wood-room and a little out room on the lower floor. Six rooms with bath and outlook.

609 Q. How long ago was the house built?

A. I don't remember the year, over 22. Twenty-two or three or four years—

Q. You have lived in it ever since?

A. Yes, sir.

Q. Are there other houses along side of you?

A. Yes, sir.

Q. And it is closely built up?

A. No, sir, none of them close. Several feet between all the houses.

Q. I mean the blocks are closely built up on both sides of the street there?

A. Yes, sir.

Q. And have been for twenty years?

A. No, sir, most of the houses on that block have only been up for a few years. I built the flats seven or eight years ago.

Q. You have a flat on this same lot?

A. No, on the same block.

Q. Facing the street?

A. Yes, sir.

Q. You built that when?

A. About seven years ago, sir.

Q. What are they, six room flats?

A. Five.

Q. How many flats?

A. Four.

Q. And they are occupied, are they?

A. Yes, sir.

Q. And have been continuously since they were built?

A. What, sir?

610 Q. And have been continuously since they have been built?

A. Not continuously by any means.

Q. What rents do you get for them?

A. I get \$25.00 for them——

Q. For each flat?

A. But they are vacant a good deal of the time on account of the train.

Q. Each flat?

A. People familiar with the city and who know the city say, no, they won't rent while there is such a noise.

Q. The train was there when you built?

A. No, sir, I don't think so.

Q. Wasn't there any train on that street?

A. There may have been, I don't remember whether the train was or not.

Q. Don't you remember that train on Fourth Street has been running ever since '71?

A. I don't remember dates at all. Never tax my memory with them. My business called me out of the city for a while—a number of years over nine or ten months of the year.

Q. When did you say you built your flats?

A. About seven years ago.

Q. And when did you build your residence?

A. Oh, twenty-four or five years ago.

Q. When you built your residence don't you know——

A. I could give you the date exactly, but I cannot give it here on oath.

Q. Don't you remember, Mr. Curran, that that railroad was operating on Fourth Street when you built your residence?

A. I don't remember anything about the date of that.

Q. Your house cost about \$2800?

A. About.

611 Q. And your lot \$2250?

A. Yes, sir.

Q. And you think you paid \$750. more than it was worth at the time?

A. Yes, sir, and have expressed myself to that effect a hundred times since.

Q. \$4300 the property was really worth when the house was built? Now have you offered it for sale since?

A. No.

Q. What is it worth now?

A. Don't know. I offer nothing for sale. Hold onto everything I get a hold of.

Q. Five or six thousand now?

A. I do not think so. I would like to sell it to some man for less money than cost, many times.

Q. P. J. Mann is dead?

A. He is.

Q. Did he live there on that street up to the time of his death?

A. Never as I know.

Q. He owned the property?

A. He lived on Third.

Cross-examination.

Questions by Mr. FENTON:

—Mr. Curran, did you give your age?

A. I was born on the 12th day of May, 1835. Seventy-five years old the 12th of May next if I live. If I die before that I won't be so old.

Witness excused.

Adjourned until Friday, December 3rd, 1909, at 10.00 A. M.

612

PORTLAND, OREGON,
FRIDAY, December 3, 1909—10 a. m.

HAROLD T. HUTCHINSON, a witness called in behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

Q. Do you live in this city?

A. Yes, sir.

Q. Business?

A. Manager R. L. Polk & Company.

Q. Does your company publish the Portland directory?

A. Yes, sir.

Q. What does your work include in connection with preparing the city directory?

A. Gathering the complete data of all the residents of the city, firms and business corporations of all kinds.

Q. Did your company publish a directory in the year 1907?

A. Yes, sir.

Q. Did it publish a directory in the year 1908?

A. 19—, —let me see, one of them was included two years in one. 1908 was included in 1907.

Q. When was that directory—the last work done on that about?

A. December, 1907.

Q. Can you, from your experience in your particular line of business and from your records, state approximately the population of the city of Portland at—during the years 1907 and 1908?

A. I was not here at the time. The management had changed; but I have the introductory portion of the directory which
613 I tore out of the books before I came over.

Q. How do you find the record of the population compares with the decennial census?

A. It compares very favorably. It is pretty close.

Q. Would the variation be great?

A. No, it isn't.

Q. When was the last census taken?

A. Our census?

Q. No, the government census.

A. 1900.

Q. Every ten years?

A. Yes, sir.

Q. From your experience in the directory business and from the facts you have stated and from reference to your records, I will ask you what, in your judgment was the population of the City of Portland in the year 1907.

A. The population given in 1907—

Mr. FENTON: That, I suppose, will be understood to be read from the directory.

Q. You give that as your opinion, will you?

A. I was not here at the time and I could not say, but our system of figuring the population is the same all over the United States.

Q. Well, then, it will have to be considered, I suppose, as from the directory.

A. The same thing as I have been figuring in Seattle for the last seventeen years.

Mr. FENTON: Do you figure as good for us as you did for Seattle?

A. I think so; just the same.

614 Mr. KAVANAUGH: Then give us what your figures show.

A. In December, 1907, we gave the population as 225,000.

That was the date of the issue of the directory.

Mr. FENTON: Gave what?

A. The population 225,000.

Q. That is Portland?

A. Yes, sir.

Q. Have you the records for 1906?

A. 1906 population, 195,195.

Q. Have you the record for 1908?

A. There was no directory issued in 1908. It was in 1907 and
08, included in one book.

Q. Have you a record of your last directory?

A. 1909 was 255,000.

Cross-examination.

Questions by Mr. FENTON:

— Will you let me see these directory sheets from which you have testified?

A. Just torn. Simply tore them out of the books.

Q. You have testified from the introduction contained in the Portland City Directory, published by your house for the years 1906, 1907 and 1908?

A. 1909. There was no eight.

Q. Well, these attempt to give the population for 1909, do they not?

A. The last sheet is 1909.

Q. Now, the one for 1908, when was the census estimated
615 that appeared in the directory of 1907?

A. If you will look on the bottom, the last part of it gives the date of it.

Q. December, 1907?

A. Yes, sir.

Q. How did you estimate that to be the population of 1908?

A. Well,—they simply—they took—they were delayed in the printing here so long that they included both years or rather, they skipped a year in order to catch up.

Q. Your estimates were all based upon your figures obtained for 1907, and the directory was published in December, 1907, was it?

A. Yes, sir.

Q. How could you ascertain what the population was in 1908 unless it was estimated based upon the work you had done in 1907 and based upon the proportions that you directory people use in ascertaining these figures?

A. Well, the 1907 directory carried along—No directory was published in—it was entitled 1907 and then they went along into the latter part of 1908 before they canvassed for the next directory.

Q. I understand you to say you have no estimate of the population of 1908?

A. Not for the current year.

Q. That is what I mean. This sheet, pages 13 and 14 dated October 15, 1906, that is for the directory for 1906?

A. Yes, sir, that is the date of issue. The information was gathered previous to that.

616 Q. You do not make any numerical count?

A. Yes, sir.

Q. How do you do that?

A. We count the number of names in the directory and use a multiple of $2\frac{1}{2}$ to represent the married women and children under eighteen whose names do not appear in the directory.

Q. When you count names in the directory, do you mean names of firms?

A. No, sir.

Q. Of individuals?

A. Just individual names.

Q. Does this include Chinese and Japanese?

A. Very few Chinese in the directory except those in business.

Q. Then you count the number of names and you multiply it by two and a half?

A. Yes, sir.

Q. Why do you use that multiple?

A. It is the general multiple as used all over the United States in directory work and is a pretty close figure.

Q. Where has the principal growth in this city been in the last three years?

A. Well, as far as I know, on the East side.

Q. Isn't it true that at the last election the voting strength on the East side of the river was very much in excess of the voting strength on the West side?

A. I couldn't say as to that.

Q. Isn't it true that the majority of school children are on the East side?

617 A. I think it is.

Q. Isn't it true that the majority of the street car traffic comes from the East side of the river?

A. I should think so, yes.

Q. Isn't it true that the portion of the city West of Fourth street is largely confined to the territory between Fourth street and Twenty-third at the widest point, narrowing to a few blocks at the head of Fourth and College, we will say, confined by the hills on the West?

A. Well, I am not very well acquainted with the lay of Portland but this side of the river is composed principally of apartment houses and such things as that.

Q. And business?

A. Business, yes.

Q. And where is the business territory in this city?

A. It is between the river, and,—oh, it runs up, scattered all up through as far as Tenth or Twelfth, then out around in the direction of the North end, runs to Twenty-third.

Q. Isn't this the business district of the—

A. Yes, sir.

Q. Commencing at Front street on both sides of it, running South to about Market Street, West to Third; down Third to Salmon; up Salmon to Fifth; down Fifth to Yamhill and out Yamhill to Tenth; down Tenth to Alder and out Alder to Fourteenth, to include the garages; down Fourteenth to Washington; out Washington to Eighteenth; down Eighteenth down Burnside and to North Eighth; North Eighth to Glisan Street or Hoyt Street; rather to the terminals; Hoyt Street to the river or Front Street. Now, isn't that the business area of this city at the present time?

A. I should think it would be.

618 Q. Isn't most of the business East of Fourth Street?

A. What business?

Q. The bulk of the business East of Fourth Street at the present time; within the area I have indicated?

A. Well, I should think that contains more the wholesale. A good deal of the retail district is above that; West of that.

Q. Yes, the department stores of the city are between Fifth and Sixth, Morrison and Alder, between Third and Fourth and Washington and Alder; and between Fifth and Sixth, Washington and Alder, are they not?

A. Yes, a great many of them in that district.

Q. With the exception of Roberts' Department Store, that is on the corner of Third and Morrison, I have named the locations, haven't I, correctly?

A. Well, I couldn't say as to that.

Q. You know there is a department store at Third and Morrison, don't you, Roberts Brothers?

A. No, I cannot say I do on my personal knowledge.

Q. In the Mohawk Building?

A. I haven't been here long.

Q. How long?

A. Since July 31st.

Q. This year?

A. Yes, sir.

Q. Where from?

A. Seattle.

Q. Seattle your home then?

A. Has been since '93.

Q. Now, the street car lines of this city as at present operated, the principal lines across the river, cross the Madison Street bridge, when it was in operation, Morrison Street Bridge, Burnside Street Bridge, and the Steel Bridge, do they not?

A. I think so, yes. I have only been across the river once since I have been here.

Q. The Morrison Street car lines all turn on Third Street excepting a single car line, the Mount Tabor and Sunnyside that runs from Third up to Eleventh and then on Eleventh up to Montgomery, that is the way it runs, does it not?

A. I couldn't say as to that.

Q. You don't know as to that?

A. No, sir.

Q. You are able to estimate what proportion of the population for 1908 is on the East side of the river out of the total of 255,000?

A. I think it gives it in that little introductory there. Those three introductions there are pertaining to the population in the different districts and I should think they would cover the whole thing.

Mr. FENTON: I will offer these three sheets as part of the cross examination, for what they are worth.

Marked Complainant's Exhibit "LL."

Redirect examination.

Questions by Mr. KAVANAUGH:

— The business runs out quite a distance on Morrison Street?

A. Yes sir.

Q. Far beyond Tenth Street?

A. Yes, some business beyond Tenth.

620 Q. And on Washington far beyond Eighteenth?

A. Yes, on Twenty-third.

Q. Business clear up Twenty-third more or less?

A. Yes, sir.

Q. Runs along Twenty-third?

A. Yes, sir, about a block along.

Q. And considerable business houses on 16th street after it leaves Washington?

A. In which direction, North?

Q. North; grocery stores and that.

A. Well, corner stores along there; I do not remember.

Q. Are you acquainted with the District at Twenty-third and Savier?

A. Not very well. I know there are some stores there.

Q. Twenty-third, Thurman, Twenty-fourth and Twenty-fifth along the carline there?

A. Where the car runs along Twenty-third Street, around Vaughn Street, close to the ball grounds there are quite a number of stores there.

Recross-examination.

Questions by Mr. FENTON:

Q. Those are chiefly grocery stores in those points you have indicated?

A. Grocery, and barber shops and meat markets.

Q. Occasionally saloons?

A. Yes.

Witness excused.

621 WALTER S. FORTIMER, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Fortimer, what is your business?

A. Civil engineer.

Q. Are you engaged in business?

A. I am in the engineering business. I am in business with Theodore Rowland, under the firm name of Rowland and Fortimer.

Q. Have you made any maps of the city of Portland recently?

A. Yes.

Q. When was it made?

A. Well, the original sheet was made in 1908, but it has been corrected for this year up to July 1st of this year.

Q. Will you explain to the Court how you made that map—what authorities you consulted?

A. Compiled from the records of the City of Portland and Multnomah County and the various railway companies and street car

companies here. Our map is a compilation from the plats and maps of the county, the municipality and of these companies.

Q. When was the map issued?

A. It was first published in 1908, in July, then we got out another edition corrected to July 1st of this year.

Q. I will ask you to examine that and tell the Court which one that is, which edition that is.

A. That is a copy of the map that was brought down to July 1, 1909, and published soon after that date.

622 Q. Can you say, Mr. Fortimer, from your work on that map and what you know was done, that it is a substantially correct map of the city of Portland as it exists today?

A. It is. It is, as far as we were able to ascertain from the records.

Q. And you consulted freely practically all the records at your disposal?

A. Everything.

Q. Did you consult, among others, the records of the Southern Pacific Railway Company?

A. Yes sir.

Q. Records of the city of Portland?

A. Yes sir.

Q. County Clerk——

A. Yes sir.

Q. —Plats on file?

Mr. KAVANAUGH: I would like to offer this in evidence.

Mr. FENTON: What records of the Southern Pacific Company did you consult?

A. Beg Pardon?

Mr. FENTON: What records of the Southern Pacific Company did you consult?

A. The copies that I think were supplied in the Assessor's office showing their lines within the city boundaries.

Mr. FENTON: A copy, you say, furnished to the City Assessor?

A. No, County Assessor.

Mr. FENTON: County Assessor showing the located lines?

A. Yes.

623 Mr. FENTON: On the various streets or on their right of way, wherever it was.

A. Well, on their rights of way where they crossed private property and on the streets as well.

Mr. FENTON: What did you find from that map?

A. Well, on the private property where they acquired a right of way they would give the ties to the nearest corners, showing the position of the line with reference to the corners, the courses through the tracks, and their central angles, curves, degrees of curvature, etc.

Mr. FENTON: When was it you saw this map that you say was a map of the Southern Pacific Company, in the Assessor's office?

A. That was some time prior to the date of getting out the first map. We were at work on the compilation about eight months. It might have been along in the winter of 1907-'08.

Mr. FENTON: Now, when was it?

A. Well, I could not name the exact date.

Mr. FENTON: Did you notice by whom the map was prepared, whether it was by Mr. Morrow, the tax agent?

A. No.

Mr. FENTON: Was it signed by anybody?

A. Well, they had a number of similar maps there that were supplied by various companies.

Mr. FENTON: I understand, but who showed you this map that you say was the Southern Pacific Company's record?

A. Well, I could not state, Mr. Fenton, that it was a Southern Pacific record. It was a map that had been supplied the Assessor's office, as I understand.

Mr. FENTON: Your knowledge on that subject was merely hearsay that it was gotten from the Assessor's office.

A. Yes.

624 Mr. FENTON: You never had any map submitted to you or pointed out to you by any officer of the Southern Pacific Company as a map of the right of way?

A. No.

Mr. FENTON: All you know is you saw in the Assessor's office a map which purports to represent the Southern Pacific Company's right of way in the city.

A. Well, I could not say as to their right of way—as to their lines.

Mr. FENTON: Well, what was it?

A. Showing the lines.

Mr. FENTON: What was it you saw? This map now that you say was a Southern Pacific record?

A. Pardon me. I didn't say a Southern Pacific Company record. I said it was a map supplied the Assessor's office showing the line of the Southern Pacific in the city of Portland.

Mr. FENTON: Didn't you say it was supplied by the Southern Pacific Company?

A. I say I was so informed.

Mr. FENTON: By the Assessor?

A. Well, some one in the office.

Mr. FENTON: Then the map that you saw, whatever it was wasn't a map whown you or purporting to be a map prepared by the Southern Pacific Company or by any officer representing them?

A. No sir, not represented to me by any officer of the company.

Mr. FENTON: You don't know whether they were prepared by that company or by any officer of the company or whether they were prepared by somebody else?

A. Not of my own knowledge.

625 Mr. FENTON: Then I object to this map in so far as it purports to show the right of way of the Southern Pacific Company on Fourth Street as hearsay.

Court: It will be admitted subject to your exception.

Mr. KAVANAUGH: What is the name of your man who makes maps? Who is the man that testified to your maps?

Mr. FENTON: Mr. Morrow, the tax agent.

Mr. KAVANAUGH: Another one.

Mr. FENTON: That is Hampton in the engineer's office. Marked Defendant's Exhibit "6."

Q. Do you remember who spoke about that in the Assessor's office?

A. I rather think it was Mr. Rowland, the Chief Draughtsman. I had access to the records in the Assessor's office among others that were on file there.

COURT: Mr. Fortimer, may I ask a question about this? You notice, I suppose, that red line is intended to represent the Southern Pacific?

A. Yes sir.

COURT: What are these black sections? There are sections that are black and sections that are red.

A. It is laid on there originally, you see, in solid color same as the other writing, but where the street names came in the line was broken so in order to make it a little more conspicuous, I put those in red.

COURT: Not intended to represent any special feature?

A. No, merely to emphasize the line which is broken in several different places.

Witness excused.

626 D. W. TAYLOR, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Taylor, how long have you lived in Portland?

A. Since January, 1854.

Q. What has been your business since you were old enough?

A. Since—nearly all the time since 1868, July, 1868, I followed civil engineering.

Q. Has Portland been your residence during all that time?

A. Yes sir.

Q. Do you remember the construction of the Fourth street road?

A. I remember the time of its construction, but during the construction I was working for the Oregon and California Road and out south. I went to work for the railway company I think in April, 1870, went out beyond Salem, and came back in the fall of 1870, and went out again in April or May of 1871 and remained out in the field until July, 1872.

Q. During this period you were away this road was constructed through the city?

A. Yes sir.

Q. But you were back here shortly after it was constructed?

A. Back in the fall of 1870, stayed all winter and until April, 1871, I think it was and was back the 3rd of July, 1872.

Q. You are acquainted with—you say the road was laid in 1870?

627 A. I think it was constructed—must have been 1871. I came back in the fall of 1870, and remember going out one day, I think it was, and we made some measurements on the road out near Marquam's Gulch. I think at that time the rails were not across the bridge. The bridge was constructed of hewn timber. My recollection is we walked along the squared timber on top of the bridge, along the latter part of 1870.

Q. Was the road laid then from there down this way?

A. That I don't remember.

Q. Were you acquainted with the general condition of the City of Portland at the time the road was laid?

A. Yes, sir.

Q. The general condition of Fourth Street by the City Hall?

A. Yes, Fourth Street had been graded. I presume it was graded below Ankeny Street. Graded in 1867 from Ankeny to Harrison; street brought to grade and sidewalks constructed and at that time, the only place on Fourth Street with any sort of permanent improvement was Washington, Alder and Morrison,—at the intersection of those streets.

Q. When did you do your first engineering work for the City of Portland?

A. I went to work in July, 1868 as rodman and surveyor in the city surveyor's office, just after I left school.

Q. How long did you work there?

A. For a year, while Mr. Morris was city engineer. He was—Stevenson was elected in July, 1870; Mr. Morris from 1868 to 1869. Mr. Stevenson was elected in 1869.

Q. Then you worked there at that time during what period?

A. 1869.

Q. Then what time in 1868?

A. I went to work in July, 1868, and worked until July, 1869.

628 Q. About a year?

A. About a year, yes sir. Then I worked a short time for Mr. Morris as County Surveyor.

Q. Do you remember the passage of the ordinance through the council, January 6, 1869, purporting to grant a right for the construction of this road?

A. Yes, I think it was approved on the 8th day of January, 1869.

Q. Do you remember about that circumstance?

A. Yes sir. Remember their getting an ordinance granting a right of way there.

Q. Did you have anything to do about the right of way?

A. Nothing at all.

Mr. FENTON: I think that was six instead of eight.

A. I thought it was the 8th of January, 1869.

Q. What was the general condition of Fourth street at that time?

A. Well, in regard to the street itself?

Q. The street itself and the buildings upon the street.

A. The street had been graded in 1867 up as far as Harrison street and the sidewalks laid, and it was practically a residence street.

Q. What was the condition of the street from Harrison to the Gulch?

A. Why, I don't know whether that was improved at that time or not.

Q. Do you know whether any stumps there or not?

A. Well, I could not say. I lived up in that neighborhood. Stumps everywhere in there, and I presume on Fourth street the same.

Q. What was the character and the number of the buildings along the street that you remember?

A. Well, Mr. Chapman had a map here yesterday on which we marked out the number of residences as far as we could tell. Is the map here still?

COURT: Yes, here it is.

MR. KAVANAUGH: You checked over that map with him, did you, as to residences?

A. Yes. I think on Fourth and Alder is the name of the owner of the property, W. P. Burke, but they weren't living on that quarter block at the time. Moved on there afterwards. Mr. Cremens lived next to them on Fourth near Washington. There is some blocks where we didn't put any residences on, not because they were unoccupied but we could not remember who they were. But the lower part I remember very distinctly, as I used to go down a good deal in that neighborhood—school mates of mine lived there. The west side of Fourth and Glisan up to as far as Ankeny street, some one resided on every block on the west side. There was Flanders, Captain H. D. Sanborn, Hartness, Lewis, Dr. Glisan, Dr. Wilson, Captain Dick Williams, on the west side, just as represented on this map. And on the east side the residences marked on the map are correct. There were some vacant lots. They are probably occupied, but I cannot remember who resided on them at that time. Then from Ankeny south on the West side is as represented on the map. Captain Myrick, Mr. Savier, Mr. Burnside, Mrs. Sherlock, Mr. John Clark, Mrs. Cremens—I don't know who occupied the quarter block owned by Mr. Burke—the Baptist Church, next to that my remembrance is J. J. Hoffman, used to be a police judge, living

630 there at the time—one of the Rosenblatts, the corner of Fourth and Morrison, Mr. Chapman and I discussed yesterday. We were not certain as to whether Mr. Masters lived there a number of years and had moved away and Mr. Smith occupied it or not, but this part is marked S. D. Smith. My impression as to that corner is that Mr. Masters probably remained there. Theodore Wygant, Colonel Teal, Murphy, Mrs. Holbrook, widow of Armory Holbrook, H. W. Davis, Court house, Dr. McKinnell. On the quarter block above Dr. McKinnell I am not sure, but I am under the impression J. D. Whiting, St. Helens Hall. On the east side there is marked on this map.

Q. You didn't attempt to run out the residences clear out to the end. What street did you stop at?

A. Stopped practically at Jefferson, although there were some

ones above that, St. Mary's Academy was up there. Further up, near Harrison was Byron Cardwell. He has been dead several years.

Q. Did you see the map that was taken—the picture taken by Mr. Joseph Buchtel, presented here yesterday?

A. I saw it presented, but I didn't have a chance to look at it at all.

Q. Did you ever see it in the historical rooms in the city hall?

A. I may have, but I don't know that I could identify that particular map.

Q. Did you see the Watkins picture taken?

A. No sir.

Q. What was the height, character and dimensions generally speaking, of the buildings along there and the material of which they were constructed?

631 A. Well, the residences of Captain Ainsworth and R. R. Thompson were considered extra good buildings in those days. They were, I think, both three story buildings with mansard roofs and were expensive construction at that time. The dwellings of Savier and Burnside were good sized buildings for that time; also the house occupied by Mr. Lewis. Dr. Wilson's was a large house. I think it still remains on Fifth street now between Burnside and Couch, but a great many of the buildings were just ordinary dwelling houses one and a half and two story buildings.

Q. Were all of these wooden structures that were along the street?

A. Yes, sir, I think there is probably, on the corner of Fourth and Washington streets—the northwest corner—Teal and Wagner had an old grocery store and that is the only store of any description I remember on Fourth Street.

Q. Teal and Wagner?

A. Teal and Wagner. They had a grocery store on Fourth and Washington.

Q. Property now owned by Mrs. Gearin?

A. Yes sir, near Rothchild's Building.

Q. What sort of a building?

A. Wooden building, small, probably one story building.

Q. Now, where was the business district at that time confined Mr. Taylor?

A. Why, part of it was on Front. The business district originally was on Front street, nearly all the business houses; then it worked back to First and some worked back to Second. Mr. Labbe 632 had a grocery store on the southeast corner of Second and Washington. I think Ewry and Cook had an undertaking establishment on the west side of Stark—between Washington and Stark—and had a stable, I think, on Stark and Second. And the rest of the street was very nearly all business houses.

Q. If you were drawing a line along the principal business section at that time, where would you draw it?

A. Confine it onto First street.

Q. And how far north and south?

A. Probably south as far as Main street on Front street, and

pretty near that on First street. At the time of the fire of 1872—'71 or '72—the big fire—the business was about that neighborhood. Now as far up as Madison Street.

Q. Would you indicate on this map, Mr. Taylor, what the lines would be of what would be known as the business section of the city at that time?

A. That is pretty hard to tell from memory, Mr. Kavanaugh.

Q. Can you tell?

A. What is that?

Q. Can you state?

A. I can tell what my memory was, but to define the limits of the business district would be a difficult matter.

Q. Well, it was Front street on the east?

A. Front street was more or less business way down near Couch street on up to Madison—business of some kind scattered along, then on First—

Q. The distance was shorter on First?

A. Shorter, yes sir. Yes it ran down—

Q. How was it on Second?

A. Second hardly any at all.

633 Q. How was Third?

A. Third, I don't remember at that time of any stores on Third.

Q. When did the Chinese quarters come into Second street? That was later, was it?

A. I think it commenced coming in just about that time. They started to build the Chinese section—were bringing in a large number of Chinese in here to construct the railroad and they began building in there probably in November, '71, '72 or '3, in there.

Q. Then you were later connected with the city in the different departments, were you?

A. I was elected city surveyor in '74. Served four years. I think from 1881 to 1883—

Q. Served again?

A. Served again and '91 to '93. They called the office Superintendent of Streets then, but it was practically the City Engineer of today and then four years recently.

Q. You have naturally on account of your employment kept pretty well in touch with the city street—

A. Yes sir.

Q. —matters at that time. Were there any sewers at the time you mention on First street?

A. No sir, I don't think there were any sewers ever constructed in the city prior to about '72. The first sewer constructed unless a private drain—I think the first was constructed on Second street, and R. A. Haversham was the superintendent of streets.

Q. Do you know when the first—when the water mains were first laid on Fourth street?

634 A. I can't remember any cast iron pipes were laid, but am satisfied at that date the pipes were made of wooden logs, bored lengthwise, connected with short pieces of iron pipes.

Q. Is that the way that water main on Fourth street was laid?

A. That was because they had a reservoir on Fourth and Market, the northwest corner pumping from the river down at the foot of the street, and it was brought in here from Bostwick at Marquam's Gulch.

Q. What is the principal business section of the city of Portland on the west side of the river at this time?

A. I suppose the heaviest business probably done on Third street—the retail business. It would depend on what business. It is scattered on Front, First, Second, Third, Fourth, Fifth, Sixth—more of it back on Seventh street.

Q. And then running east and west—

A. Extends to the end of Morrison street practically and on Washington out as far as Twenty-third.

Q. How is Fourth street located with reference to the business section as being near the center.

A. I think it is getting about the center of the business section now.

Q. Is it an important business street at this time?

A. Yes, sir.

Q. It is a particularly wide street as compared with many others in the center of town, is it?

A. Well, the wide commences at Third. First and Second were originally sixty feet and Third is just seventy feet, Fourth is eighty feet wide.

Q. How wide are the streets in the other directions?

A. Sixty feet, except Ankeny; that is thirty.

635 Q. Have you ever noticed the running of the cars and locomotives on that road?

A. Well, I have been in the council meetings at the time the trains ran by and we always had to stop proceedings.

Q. Until it was past?

A. The train passes, and in my office in the City Engineer's office on the northwest corner of the block, the windows would rattle.

Q. That is the corner on Fifth and Madison?

A. That the windows rattle. You can feel the room jar.

Q. Clear across the building?

A. Yes sir.

Q. Almost a block distant?

A. It is on the farther side of the block—a block from the track?

Q. Now, what was the vibration caused on the street—was there quite a vibration with the building adjoining to it, do you know?

A. I never looked particularly at any buildings except the city hall. You can feel the vibration in the council room plainly.

Q. What effect, if any, has the running of these cars upon the sewers and drains and water pipes?

A. I don't know of any damage to any sewer caused by running of trains.

Q. How deep are the sewers laid?

A. Eleven feet and from that on deeper.

Q. Below the surface?

A. Below the surface, yes sir.

Q. Do you know of any breakage of water mains?

636 A. Several serious breaks of our water mains. Whether it is due to the train or not, I am not able to determine.

Q. You know there were several breaks?

A. Yes. One at the Court house; one between Yamhill and Morrison; one between A-kney and Burnside—all bad breaks.

Q. That is where Gunst sued the city?

A. That was Fourth and Alder.

Q. His place was on Third and Alder. The water went around Alder and went into his basement?

A. I think that suit was a breakage either up on Salmon or between Yamhill and Morrison.

Q. It might have been further up?

Mr. FENTON: That was on Fourth Street?

A. The break was on Fourth Street.

Q. How did the breakage during your connection with the city, of water mains on Fourth Street, compare with the breakages on Fifth and other streets?

Mr. FENTON: Object to that unless shown caused by the railroad. It may have been the construction. It may have been accidental. Unless there is some connection shown between the breakage and the vibration due to the trains.

Court: Counsel is trying to show by comparison, and will argue from that it is due to the railway. Let the witness answer.

A. Well I don't—I have no knowledge of any breaks on Fifth Street. Of course the water main business, attending to that, is entirely in charge of the water department.

Q. Another Department?

A. Another Department.

Q. Could you indicate by a drawing on the map here approximately what was the principal business district in 1869, and
637 approximately what is the principal business district now?

A. I could, but it would take some time.

Mr. KAVANAUGH: No objection to marking it on this map?

Mr. FENTON: No. You can excuse him and he will mark it on the map. I am perfectly willing to believe him. Mark it in with colored pencil.

Witness excused temporarily.

638 W. T. VAUGHN, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Vaughn, you were formerly a member of the City Council of the City of Portland?

A. I was.

Q. How long were you a member?

A. Four years.

Q. And attended Council meetings quite regularly during that time?

A. Yes, sir.

Q. Were you ever in the Council Chamber when Council was in session, when the Fourth Street trains went by?

A. Yes, many times.

Q. What was the effect on the proceedings when the trains were passing?

A. It became necessary to suspend business during the time probably one minute or two minutes, possibly longer,—They had a rear end locomotive and we would have to wait until the whole train had passed before we resumed business.

Q. Was there a vibration in addition to the noise?

A. Yes, sir.

Q. Did that occur several times a day as a rule?

A. Well, it occurred I think in invariably every council meeting, and very often during the Committee meetings the same conditions would occur.

Q. There were at that time several committee meetings
639 a week?

A. Yes, and some two or three committee meetings every week, and then the council met at least every two weeks, sometimes oftener than that, special meetings, adjourned meetings.

Q. Were you a member of the council when ordinance No. 16491, requiring the company to remove the trains, the locomotives from the streets, was passed?

A. Why, I presume that is the number.

Q. That is the one that was passed.

A. Yes, I was. It was the one that required them to suspend the use of the locomotives?

Q. Yes, that is the only one ever passed.

A. Well, I was.

Q. I will ask you whether, as a member of the council, there was considerable complaint made to the council—

Mr. FENTON: Objected to as immaterial.

Mr. CAVANAUGH: Wait until I finish my question.

Q.—considerable complaint made to the council by residents and people affected by the noise, vibration and inconvenience, and danger of operation of the locomotives on that track, urging the passage of this ordinance.

Mr. FENTON: Immaterial and incompetent.

Court: The witness can answer; I think it is probably not very material to this inquiry.

Mr. KAVANAUGH: I don't wish to insist upon it.

640 The Court: It is an equity suit. If you want it in the record you can put it in for whatever it is worth.

A. Yes, I will say that committees have visited the Council and have visited me at my office on several occasions, and have com-

plained concerning the nuisance caused by the locomotives and trains running up and down the Street; claimed it was dangerous and generally a nuisance.

Cross-examination.

Questions by Mr. FENTON:

— Mr. Vaughn, do you remember on May 1, 1907, when Council passed the ordinance,—before the Council acted on Ordinance No. 16491, there was a protest read in the Council and referred to the Street Committee in these words:

“To the Hon. Mayor and Common Council of the City of Portland:

The Oregon & California Railroad Company, and the Southern Pacific Company, lessee, as the successors in interest in possession of all the rights, franchises and privileges created and conferred by Ordinance No. 599, passed and approved Jan. 6, 1869, granting to the Oregon Central Railroad Company certain rights on Fourth Street, in the City of Portland, to which rights reference is hereby made, do hereby respectfully protest against the passage of Ordinance #——, upon the following ground, to-wit, that the said proposed ordinance is unreasonable and invalid, but particularly because it is not within the power of the Common Council to repeal, amend or modify said Ordinance No. 599.

641

OREGON & CALIFORNIA RAILROAD CO.,

By J. P. O'BRIEN,

Its Second Vice President.

SOUTHERN PACIFIC COMPANY,

By J. P. O'BRIEN,

General Manager.

Dated May 1, 1907.”

A. I have no recollection of it, Mr. Fenton.

Q. You do not remember that such a communication was read by Mr. Grutz, the Deputy Auditor, who attended the meetings of the Council at that time,—and that upon the motion of someone, it was referred to the appropriate committee and afterwards reported on the 16th of May?

A. I have no recollection of it at all.

Q. You wouldn't say whether it was or not?

A. No, I could not say whether it was or not.

Q. When did you come to Portland?

A. October 8, 1899, I came here.

Witness excused.

642 R. M. GRAY, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Gray, how long have you lived in the City of Portland?

A. Five years.

Q. What is your business?

A. Clothing.

Q. Where is your business house situated?

A. Corner of Fourth and Morrison, 273 and 275 Morrison Street.

Q. How far does it extend on Morrison Street?

A. Fifty feet.

Q. And how far on Fourth?

A. 100 feet.

Q. General clothing business there?

A. Men's and women's exclusive outer garments shop.

Q. What car lines run on either side of your store building there?

A. Well, the Sunnyside and Mount Tabor, the "W" cars, Depot and "W" cars,—run in front of the store on Morrison Street and the Southern Pacific on Fourth Street.

Q. I wish you would state to the Court what is the effect on your business of the operation of the cars on Fourth Street in your own way.

A. Well, I might make a statement. It would be a statement of the interference with the business as I term it.

643 Mr. FENTON: I will save a formal objection to this as incompetent, irrelevant and immaterial, and speculative.

Q. Just proceed.

A. I will say that during the passage of the train on Fourth Street—I will state first that we have a ladies' department, and there are a great many telephone calls where there is a ladies' department in a store, and someone is using our telephone almost constantly during the business part of the day, inquiring concerning alterations of garments, etc., and the alteration room, and whenever there is a train passing it is absolutely impossible to use the telephone. That is the first serious objection that I have to the railway. The second is, I have my store equipped with a very elegant and expensive lighting arrangement. I have, as some of you know, perhaps, a very modern arranged store, and I use the Tungsten lamps. I use over two hundred Tungstens in my store. I have 200—something more than 200 Tungsten lamps in my store, and have them in chandeliers, and I had the store—this new store on the corner, I opened on the 1st of April.

Mr. FENTON: Last?

A. The first of last April, yes, sir. At the time this new equipment was put in, and I have had a great deal of bother from breakages of these lamps, and I took the matter up with the—with my architect, and also with the Portland General Electric Company some

time ago, to ascertain why it was I was having this difficulty with the breakages and they after investigation said it was because of the——

644 Mr. FENTON: I object to that as hearsay.

The COURT: What they say is not competent testimony.

Q. If you know yourself what caused it, you may state.

A. I will say that I positively know myself that the Southern Pacific Railroad Company is the cause of these breakages to an extent, because we have stood in the store and saw the lights go out when the train goes by, which is evidence enough; and I will also state that it jars the entire building every time the train goes by and more so when there is a heavy load. They take a run; they stop down in front of the Chamber of Commerce and take a run for that steep grade and have on all the power they can get and jar the building. Some of these old buildings will fall down some of these days if they keep hauling along there.

Mr. FENTON: I move to strike out the statement of the witness that some of the buildings will fall down.

The COURT: That is opinion; it is probably not competent testimony.

Q. The breakages which are due direct to that jarring of the train, what would they amount to a month to you?

A. It is costing me about twenty-five dollars per month now.

Q. How about noise, is there much noise there?

A. The noise is so that you cannot talk. Of course, my store is situated so that it is practically in the street. We have all glass on that side, and the noise is so that when that train is going by and especially a freight, the noise of the engine,—you simply

645 cannot carry on a conversation.

Q. Does it interfere with your business?

A. It certainly interferes with business, with the proper transaction of business with customers.

Q. How are they run—Is there—As to whether or not there is an engine on both ends of these big freight trains?

A. There are engines on both ends.

Q. And then does the engine separate at some place up the hill and come back?

A. I don't know; I see an engine come back frequently alone.

Q. Frequently single engines coming up and down the street?

A. Yes, sir, frequently.

Q. And several trains a day?

A. Several trains a day.

Q. Now, I will ask you, Mr. Gray, what is the comparative effect on your business of the steam railway and the several electric lines that pass in front of your house.

A. As to the noise?

Q. As to the inconvenience and dirt.

A. As to the noise and inconvenience, of course, the street cars

do not make sufficient noise to bother us as a heavy train would make.

Q. Do they interfere with your business in a comparative way with the other at all?

A. None whatever.

Q. There are several lines in front of your place, are there?

A. Yes, sir, several cars there constantly.

Q. Double track Fourth and Morrison?

646

A. Yes, sir.

Cross-examination.

Questions by Mr. FENTON:

— When did you come to the City, Mr. Gray?

A. I came to Portland first in November, 1904.

Q. From what place?

A. Salt Lake City.

Q. You have been a merchant for how long?

A. Ten years.

Q. Before you were a merchant what was your business?

A. I was a clothing salesman.

Q. Travelling?

A. No, sir, in the house.

Q. The business that you have followed since you came to Portland until you opened up this new store was the handling of gents' furnishing goods?

A. Furnishings, clothes and hats.

Q. That was your specialty?

A. Yes, sir.

Q. When was it that you introduced a ladies' department?

A. At the time of opening the new store corner of Fourth and Morrison, April 1st. We opened the department for business formally.

Q. April 1st, 1909?

A. Yes, sir.

Q. And that is the thing which contains the chief portion of the store now, on the Fourth Street side,—that is where the ladies' departments are?

A. The ladies' department occupies about thirty feet on Fourth Street and the men's department, seventy feet on Fourth

647

street.

Q. And where are those lamps you speak of, those Tung-

stens?

A. They are arranged in chandeliers on either side of the store. Take the front part of the store. My business is in two departments, separate rooms entirely but connecting passage way between the two and in the 70 feet by 50 feet in the front part is the men's department, and the chandeliers are up and down either sides,—cabinets in the middle and cabinets on the side divide quite a distance between the center cabinets and the side cabinets are the chandeliers containing the lamps. Then I have windows fifty feet on Morrison

Street and windows along 100 feet, except the stairway $5\frac{1}{2}$ feet on Fourth Street. Windows are down that entire side.

Q. Plate glass windows?

A. Plate glass windows, yes, sir, these windows are all equipped with these Tungsten lamps.

Q. How many Tungsten lamps in the windows?

A. I cannot tell exactly.

Q. About?

A. In the window?

Q. On Fourth Street.

A. On Fourth and Morrison?

Q. No, on Fourth.

A. On Fourth Street,—well, I could not say positively,—I would say there is a hundred or more.

Q. One hundred of the two hundred?

A. Sir?

Q. One hundred of the two hundred?

A. I think there is probably one hundred lamps.

648 Q. There in the window?

A. Along the edge of the window, yes, sir.

Q. That is for illumination?

A. For illumination of the windows.

Q. At night?

A. At night.

Q. Your store does not keep open after six except Saturdays?

A. Except Saturdays.

Q. Saturday until Ten?

A. Nine-thirty.

Q. Nine-thirty?

A. Yes, sir.

Q. So the only object of this lighting except Saturday evening after six o'clock is for display?

A. Sir?

Q. Advertising?

A. Yes, sir.

Q. And they are kept lit how late at night?

A. 10:30 to 11:00 o'clock.

Q. How many of these lights on Morrison Street side?

A. Probably one half the number.

Q. Probably fifty?

A. Probably fifty, yes, sir.

Q. Are they kept lighted in the same way?

A. All turned on at the same time.

Q. And during the summer time those lights would not be turned on at all until Saturday night?

A. The lights are always on in the evening.

Q. I know, but are they on all over the store at night?

649 A. Not inside the store, no, sir.

Q. Are they on—

A. The windows are always lit.

Q. Then these one hundred and fifty Tungsten lamps are all on

display in the windows, even after store closes until ten thirty at night?

A. Yes, sir.

Q. Winter and summer?

A. Yes, sir.

Q. They are there for that purpose, that is—for display?

A. Yes, sir.

Q. Not there particularly to light the store at night?

A. They do light the store.

Q. But are not there for that purpose?

A. Are not there for that purpose; they are for display.

Q. Your store covers 50 x 100 feet?

A. 50 x 100.

Q. On the ground floor?

A. Yes, sir.

Q. And is there a brick wall dividing the store into the two parts?

A. There is a brick wall—a partial brick wall between. The wall has partially been removed. Just a division arranged in the building. That is, this wall separates the East part of the fifty feet from the West part.

Q. And the wall runs North and South?

A. The wall runs East and West.

Q. Oh, yes.

A. Seventy feet in the front is the men's department, and thirty feet in the back is the ladies' department.

Q. How much opening in the wall?

A. How much opening in the wall?

Q. Yes, other than the passage way or door?

650 A. Yes, more than that. The wall is half way torn out.

Q. So you have an opening that is arched over?

A. Not arched over. The wall is taken out entirely and has an iron beam overhead.

Q. A square opening of about what width?

A. The opening proper is only about,—I would say eight feet, but the stair goes up back from that to a balcony. We have a balcony in the store.

Q. Where is the balcony?

A. The balcony is upstairs where this opening is. The actual opening is about 16½ feet; part of it is occupied by the stairway going to the balcony.

Q. Now, these Tungsten lamps that you say break;—a breakage of about \$25.00 a month, how long have you been using them?

A. We buy boxes frequently,—we put them in as fast as they go out.

Q. How long have you been using the lamps?

A. Since the first day of April.

Q. They were new here in the city, were they?

A. Yes, sir, they were considered new at the time.

Q. A new invention?

A. A new idea.

Q. And are being pushed by the Portland General Electric Company as a better lamp than those furnished by the Portland gas?

A. We have heard nothing like that. We have bought them from different people. We have bought them from different firms. I saw the lamps first in Chicago on my trip last December and was much interested in the lamp because it gave a beautiful light, and the Portland General Electric did not introduce them to me at all.

I made them get them for me.

651 Q. That is their advertised special light here?

A. They use all lights.

Q. That is something special?

A. We can buy any light we want from the Portland people.

Q. This lamp, this Tungsten lamp, is it a film?

A. I do not know what you mean by a film.

Q. How is it made?

A. Well, it is a very delicate wire inside; of course, I do not know what this lamp is here. A wire inside of that. The wiring is very delicate—a very fine wire. It gives a beautiful light but a very sensitive light.

Q. Does it have any mantel?

A. I don't know what you mean by mantel. A mantel is not used with electricity. I do not know what you mean by mantel.

Q. You never used gas?

A. No, sir.

Q. This Tungsten lamp is a delicate wire of high tension for lighting purposes?

A. Yes, sir.

Q. And very susceptible to jars or movements of air currents or things of that kind?

A. I suppose so, yes.

Q. Do you notice any difference in the place where the breakages occur? This wire, whether they break on Fourth Street at the East end of the fifty feet,—I mean on Morrison Street instead of Fourth Street, the same as they do on Fourth?

A. The breakages in the windows have been practically all on Fourth Street.

Q. None on Morrison?

652 A. None in comparison with Fourth Street.

Q. Twice as many lamps on Fourth Street?

A. Yes, there is probably twice as many on Fourth.

Q. And breakages on Fourth Street have been twice as many as on Morrison?

A. I think more than that.

Q. When they break, what breaks?

A. They simply go out. The wire disconnects.

Q. Those little wires disconnect from the current?

A. When they break, the wire swings.

Q. Swings out?

A. Yes.

Q. The delicate wire which lights?

A. Yes, sir.

Q. How long after they have been burned does it take for them to break—what period of time?

A. We have had them break the very day we put them in.

Q. Is there a life to this lamp?

A. Supposed to be ninety days.

Q. And do some of them burn that?

A. On regular usage they would burn ninety days.

Q. Do some burn ninety days?

A. Some burn longer. Some have been in since we opened the store.

Q. You think it is the jar and vibration caused by the train passing on Fourth Street that causes the breakage of these lamps?

Q. Without question, to an extent.

Q. Now, you say the ladies cannot use the telephone.
653 Where is the telephone?

A. The telephone is at my desk in the rear end of the seventy foot room.

Q. How far from the street?

A. The desk is about twenty feet from Fourth street.

Q. Door opposite there?

A. Yes, sir.

Q. This door is open?

A. The door is kept closed. It is the side entrance where we receive merchandise.

Q. Transom open?

A. Transom open overhead, yes, sir.

Q. The noise of the train such as to be an inconvenience to the use of the telephone twenty feet away at your desk?

A. Simply can't use it.

Q. Ladies, of course, complain?

A. And I complain myself because I take a good many messages.

Q. Do you talk with ladies over the telephone?

A. Yes, I talk with ladies. I don't let my wife know it.

Q. Don't let your wife know it. You moved into this place—when did you lease this 50x100?

A. The lease was made about a year ago. I don't remember the day. Leased a quarter of a block.

Q. You leased the entire 100 feet square, belonging to the Blumauer estate?

A. Yes, sir.

Q. That is the old Blumauer property,—been there a great many years?

A. Yes, sir.

654 Q. You were in the same kind of business with the exception of the ladies' department in the Eastern part?

A. Except in that department we carried furnishing goods and hats.

Q. You do not now carry furnishings and hats, do you, but you carry men's clothes?

A. And furnishings and hats in the other department.

Q. What is the size?

A. 50x100.

Q. That is, the East 50 of that 100 feet square?

A. Yes, sir.

Q. How long have you been there?

A. I occupied that four years.

Q. And you paid what rent for that?

Mr. KAVANAUGH: I don't see how that is material.

Mr. FENTON: I want to show the business is not damaged.

A. I paid \$450. a month rent for it.

Q. What do you pay for the 100 feet?

A. Eighteen hundred a month.

Q. You made about twenty thousand dollars in the purchase of that lease, did you not?

A. Sir?

Q. You made about twenty thousand in the purchase of that lease, and sub-letting it?

A. I don't know; I have been offered more than that for it.

Q. You have been offered more than that above the rent?

A. Above the rent. I sublet some and made a profit.

Q. What profit?

A. I made about \$20,000.

655 Q. Now, then, that is to say, four years on Fourth and Morrison.

A. That is in the middle of the block where I sublet.

Q. What do you pay for the 50x100 now?

A. I do not figure that at all. My lease is on the 100x100.

Q. How long a lease?

A. I have six years from now.

Q. From now on?

A. Six years from now.

Q. Then, as a matter of fact, you sublet the East fifty feet so that your 50x100 is practically clear to you without rent?

A. No, my rent stands me \$185.00 a month.

Q. What would it rent for?

A. Probably \$1800.

Q. By itself?

A. Yes, sir.

Q. And that notwithstanding the Fourth Street trains?

A. Yes, sir.

Q. You knew these trains were operated there about as they are, with some four years' experience in doing business on the East fifty feet, didn't you?

A. Yes, sir.

Q. And notwithstanding that knowledge, you took the entire 100 feet square and put your own store on the corner?

A. When I took that I figured the Southern Pacific trains would not be there. Because of the order, I thought the City Council could move them away.

Q. You sold your lease with the same idea, I suppose?

A. No, I didn't consider them at all.

Q. Sub-let it. You regard your 50x100 feet as very valuable?

656 A. Yes.

Q. You wouldn't give it up?

A. I regard it as the best location in Portland.

Mr. KAVANAUGH: Objected to as incompetent, irrelevant and immaterial.

Q. This was leased before May 1, 1907?

A. No, the lease was made last year?

Q. Didn't you have an option?

A. No, sir.

Q. The electric cars, now, that you speak of, run on Morrison Street, they are the Sunnyside and Mount Tabor and the "W" cars?

A. Yes, sir.

Q. About how frequent—The Sunnyside now doesn't pass there does it?

A. They have that divided into sections. There is one part of the Sunnyside that runs up to Twelfth and back, and one goes around Third Street.

Q. Don't you know, Mr. Gray, that you cannot get a Sunnyside car proper farther West than Third Street, that you must now turn the loop?

A. No, I do know one is operated West and South.

Q. That is the Mount Tabor, not Sunnyside. The Mount Tabor that goes up to Eleventh and Montgomery?

A. No, sir, there are two cars. One goes up Montgomery and one goes up Twelfth.

Q. When do you get the Sunnyside and Mount Tabor?

A. You can get it any time, it runs regular.

Q. What time between cars?

A. I couldn't tell you.

657 Q. You know there has been a change within the last two weeks, and that all the Sunnyside cars turn the loop, and the various people come down and stand on Third Street that heretofore got on at Fourth, Fifth, Sixth and Seventh. You know that?

A. Yes, sir.

Q. How often do those cars pass in front of you?

A. Passing almost constantly, some car.

Q. They are what width cars?

A. I don't know.

Q. They are just the ordinary electric cars?

A. Yes, sir.

Q. And they pass in front on Morrison, coming down to Third and going across the Morrison Street Bridge for Sunnyside, and Mt. Tabor. That is right, is it?

A. Yes, sir.

Redirect examination:

Q. The cars that run on the north track on Morrison Street, the electric cars, are much closer to your store than the railroad is?

A. Well, the street is a little narrower; I think Fourth Street is a little wider.

Q. Not in the center of the street, that track?

A. Not in the center of the street.

Q. Fourth Street is 80 feet wide, and the other 60, and the Fourth Street track is in the center, and these tracks are at the side?

A. Yes, sir.

Q. Bringing it considerably nearer?

A. Considerably nearer, yes, sir.

Witness excused.

658 D. W. TAYLOR resumes the stand.

Direct examination continued.

Questions by Mr. KAVANAUGH:

— I would like to ask Mr. Taylor whether he has marked that map (Defendant's Ex. 6).

A. I will state that on the west side I marked with red pencil as near as I can remember, what was the business district at the time the franchise was given for the Fourth street railroad. There is a mill there, Walker's planing mill, that don't show on this map, but the red pencil line shows the business district as I remember it in '69 and '70. There was where John P. Walker had a large planing mill between Columbia and Clay street.

Mr. FENTON: Opposite the figure 3?

A. In that neck. The large planing mill burned down in the big fire of '71 or '72.

Q. '73?

A. We had two fires. '73 was one. In August, 1873, his mill was destroyed entirely. The blue line represents the present business district.

Court: On both sides of the river?

A. On both sides of the river. Of course on the East side there are quite a number of vacant lots. It is pretty hard to designate them. It is very hard. Well, that is pretty near it. It is pretty hard to tell, that is, substantially. I would cut that out. That is largely railroad property. This takes out by Oak street (illustrating on map).

Q. Burnside?

A. Burnside or the bridge. Cobb's mill. The Portland Box factory and all the places in there.

659 Cross-examination.

Questions by Mr. FENTON:

— General Taylor, you were the city engineer for the four years ending July 1, 1909?

A. Yes, sir, nearly four years, lacking two months of it.

Q. And you have lived in the city since when?

A. 1854.

Q. And you were the Surveyor General of this city?

A. 1886 to 1890.

Q. How many years?

A. Four years.

Q. And you consider that you are fairly well acquainted with the location of all the railroad lines of the city as they have been from time to time located and operated?

A. Well, it would be rather hard to determine where the East Side road, the old O. & C.—I know approximately where it was, but could not give the exact location.

Q. I don't mean where it was in the beginning, but where it has been for the last fifteen or twenty years.

A. Oh, yes.

Q. I will ask you to state to the Court whether or not it is a fact that the main line of the Oregon and California Railroad Company, Southern Pacific Company, lessee, leaving from the Union Depot at the end of Fourth street, on the west side of the river, does not cross the railroad bridge of the O. R. & N. Co., commonly known as the steel bridge, and then intersect on East First street and then run thence from East First street as shown on defendant's Exhibit 6, through what was formerly East Portland—on East First street where I am now pointing, to a point at about East Market, and thence on its own acquired right of way, diagonally, as shown on this dark line marked Southern Pacific Railroad, until it goes out through Milwaukee, and if that has not been there for over thirty years.

A. Of course that has—I don't know when that change was made. They at one time ran over here near Inman Poulsen's mill.

Q. But on East First has been there over thirty years?

A. Yes, sir.

Q. I will ask you to state if the street car traffic of the Portland Railway, Light & Power Company does not cross over that main line track at East First Street and East Morrison Street, and has not so crossed ever since the street car line, formerly a motor line, was built.

A. Yes, sir.

Q. I will ask you to state if it is not a fact that at least 60% of the residents of the City of Portland live on the East Side of the river, at the present time.

A. That I would not like to swear positively to. I think that is very nearly correct; 60 or 65%—55%.

Q. I will ask you if it is not a fact that the line of the Portland Railway, Light & Power Company passing over East First, East Morrison and East First, and thence across Morrison Street Bridge, runs from Mt. Tabor, a distance of about three miles east of the east end of Morrison Street Bridge.

A. Yes, sir.

Q. I will ask you to state to the Court whether or not it is true that the city of Portland is built almost solid from Mt. Tabor to the east end of the Morrison Street Bridge, on both sides of that car line, between Hawthorne Avenue and the Base Line Road?

661

A. I would not consider it built solid there. Up past Sunnyside there is a section there—from there to Mt. Tabor, it is very scattering.

Q. Mt. Tabor is closely built up?

A. Mt. Tabor is closely built up, yes sir.

Q. Then a space between Mt. Tabor and the eastern part of what is called Sunnyside where it is sparsely settled, you say?

A. From East Thirty-ninth to about East Sixtieth, formerly West Avenue.

Q. East Sixtieth, or formerly West Avenue is about the heart of the district?

A. The west slope, yes sir, this side of the central.

Q. What would you say as to whether or not the traffic on that car line from six o'clock in the morning to twelve thirty at night, is not the heaviest traffic of any car line in the city excepting Washington Street?

A. Well, I question that. I think the travel probably on the Third street and on Morrison are pretty near as heavy. Third especially.

Q. You think the traffic on Third street north and south parallel to the river, is about as heavy as on East Morrison?

A. Yes sir.

Q. I will ask you to state to the Court whether or not this territory on East First street between Clay and Burnside is not substantially covered with business blocks, jobbing houses, wholesale stores and some retail business at the present time?

A. Nearly all covered, a few vacant portions of blocks.

662 Q. I will ask you to tell if Union Avenue or Fourth Street, and Grand Avenue, or Fifth Street, aren't continuous business streets in the center of the East side of the river running from Hawthorne Avenue on the south to Burnside at the north.

A. Union Avenue is pretty near a continuous business street from Belmont north, but from Belmont south to Hawthorne Avenue not very much business.

Q. How about Grand Avenue?

A. Grand Avenue is almost continuous. Some scattering places, but might say it is a continuous business street from Hawthorne Avenue down.

Q. I will ask you to state to the Court whether or not the Portland Railway, Light and Power Company is not also located as indicated on this map, defendant's Exhibit Six (6) by the line of the Oregon Water Power and Railway Company, now the Portland Light and Power Company, and if it is not located about where that black line is.

A. Yes, as near as I can determine.

Q. And when the Madison street bridge is in operation that crosses over the Madison Street bridge?

A. Yes sir.

Q. I will ask if that does not handle a very large city and suburban business between Oregon City and Gresham and Milwaukie and Sellwood and the Waverly links—the golf links, and

all these suburban tracks and additions between Oregon City and Portland and bringing it in at the present time on account of the absence of the Madison street bridge, for distribution by transfer across at East Water street and Morrison street on the same 663 car line between Grand Avenue and East Water?

A. On East Water and Morrison.

Q. Is that the condition? Does that serve a large traffic?

A. Yes, sir.

Q. I will ask you to state if it is not true that the East Ankeny car line, which extends to Montavilla, northeast of the Mt. Tabor District, three-and-a-half miles from the Morrison Street Bridge, does not come down East Ankeny to Grand Avenue, thence down Grand Avenue to East Morrison, thence on East Morrison over the bridge to Third, and turn that loop, around Third to Yamhill?

A. Yes, sir.

Q. And do not the Waverly-Woodstock cars, and the Waverly Richmond cars, serving the southeastern portion of the city, as shown on this map, bring in their traffic to East Morrison?

A. Yes, sir.

Q. And distribute around that loop at Third Street; none cross over Fourth Street, do they, except the Sunnyside and the Mt. Tabor and the "W" cars?

A. That is all now—the "W" and the Mt. Tabor. The Sunnyside makes the loop nowadays, Sunnyside makes the loop now.

Q. How long since.

A. I think the 15th of November.

Q. I will ask on the west side of the river, if the heaviest street car traffic is not on Washington Street feeding the Willamette Heights car line, and the Ford Street, Portland Heights car line, the Council Crest carline coming from Council Crest and uniting at 23rd Street and coming down from 23rd to Third and First on Washington?

A. Yes, sir. They also take the 16th.

Q. Yes, take the 16th Street business.

664 A. And the Thirteenth street travel.

Q. How does that traffic compare in point of number with the traffic delivered over East First street at First and Morrison in percentage?

A. I could not tell. I presume it is heavier on the east side of the river on account of all joining at First and Morrison.

Q. In other words, the car traffic on the Portland Railway, Light and Power Company, the Oregon Water Power and Railway Company, now the Portland Railway, Light and Power Company, feeds all of this street car traffic into East Morrison Street, except that that passes over the Burnside or steel bridge from Holladay Addition to Irvington and points north?

A. Yes sir.

Q. Now, isn't it true that the traffic, this traffic over East First at East Morrison street is probably fifty per cent more, possibly one hundred per cent more than the traffic that crosses Fourth and Washington street?

A. Fifty per cent; is probably very much heavier. Fully fifty per cent heavier crossing over East First over the bridge?

Q. Now, the business from the Madison street bridge as formerly operated, none of it passed over Fourth street on the car line, did it?

A. No sir, from Madison street bridge to Second or First and down First and ran back on Second.

Q. How does the Northern Pacific Railway Company come into Portland?

A. Why, they come into the north end across the Guild claim on the east side of the lake and come up over Sherlock Avenue
665 until they get to about Seventeenth and switch over the curve and get in that——

Q. North Front street?

A. North Front street.

Q. Does it land in the Union Depot?

A. The passenger trains run in there.

Q. What is the fact as to there being residences from about Nicolai in Sherlock's Addition almost all the way up the Union Depot on the west side of the track—old residences?

A. There aren't very many now. At one time there were quite a number.

Q. Now, devoted to what kind of business?

A. The electric light have a plant there and the mill company use a large portion of the east side. Some stores, saloons——

Q. Some warehouses?

A. Some warehouses, yes sir.

Q. How does that North Bank, or the Portland, Seattle and Spokane Railway Company get into Portland?

A. They come in over the——

Q. Northern Pacific?

A. Same line the Northern Pacific tracks, and they switch in and come up North Eleventh—has a passenger station.

Q. Their terminals are north of——

A. North of Hoyt street.

Q. North of Hoyt street and west of what are called the Northern Pacific terminals.

A. Yes, extending out to Twelfth street.

Q. How does the O. R. & N. Co. get into Portland?

A. They come in through Sullivan's Gulch.

Q. As indicated on this map?

666 A. As indicated on this map. Then swing back on the east side of the river at the end of the steel bridge, cross that and come into the terminal grounds the same as the Southern Pacific.

Q. How does the Portland-Yamhill division of the Southern Pacific, or the Oregon and California, come into Portland?

A. They follow down the west bank of the Willamette River and land on what used to be the public levee.

Q. Foot of Jefferson Street?

A. Between Jefferson and Clay on the river.

Redirect examination.

Q. What street does the Southern Pacific Company get into East Portland on to the business section?

A. Comes down East First street.

Q. What is the character of the business along East First street where it goes through?

A. Well, they are nearly all warehouses, the Standard Oil—along there are quite a number of firms handling agricultural implements.

Q. Practically all a warehouse district?

A. Practically all a warehouse district.

Q. And how does it get out? Does it run along the gulch by Inman-Poulsen's Mill out—

A. It swings after it leaves Market street—it leaves East First at about Market then curves to the left following the private right of way secured years ago in the start—I think they have a private right of way until way beyond the city limits. They went along the east bank of what is called Brooklyn Slough and crossed Powell street southerly from there.

667 Q. Do you know any retail business houses along that railway track on the east side?

A. I can't think of any now. I think there is right across Powell street. I think a store at the west side of the track, but not on the track, some distance from it, faces on Powell street.

Q. The number of residences along the track are very few?

A. Not very many until you get up in the neighborhood of Powell street; come in Tibbetts' last addition from East Twelfth street, some in there. Some between Powell street and the car shops; not many on the car line because it is private right of way.

Q. Do you know how wide that railway right of way is there?

A. I think it varies; some places thirty feet, others wider. Most of the distance, I think it is thirty feet wide.

Recross-examination.

Q. The old residence district of Tibbetts' Addition from, we will say—I mean Stephens and Tibbetts' Addition—from Hawthorne south on each side of the private right of way, is occupied by residences mostly built many years ago?

A. A lot of small buildings—I don't know whether squatters, or not.

Q. Any private residences?

A. Mostly very poor buildings.

Q. As you get in nearer town you find new residences close to the right of way but of course not facing on that?

A. Built close to the right of way, but that right of way is what you would call the back yards. The buildings face the streets.

668 Redirect examination.

Q. Does the grade of the east side of the river, the track of the Southern Pacific on the east side through the business section—

Recross-examination.

Mr. FENTON: Just one question I forgot.

Q. The Portland trains to San Francisco of the Southern Pacific all pass on East First street?

A. Yes sir.

Q. And the local trains serving the Willamette Valley and Southern Oregon all pass on East First?

A. Yes, on the east side of the river.

Q. I mean the trains to Salem and Eugene and the points south?

A. All on one track.

Q. All on East First street?

A. Yes sir.

Q. Can you, roughly speaking, estimate how many passenger trains come in and out on that track for a day?

A. I could not.

Q. You don't know—at least three through trains to California?

A. Yes, I know three through trains, but I don't know how many others.

Q. What number of locals?

A. I think one to Cottage Grove.

Q. One to Roseburg?

A. I don't know whether local or regular. Four trains so far as I know running daily there.

Redirect examination.

669 Q. How does the grade on East First street on which the track of the Southern Pacific is laid compared with the grade on Fourth street on this side of the river?

A. The grade on East First street until you get to where it leaves the street at East Market street is a very easy grade, very light fall, and the grade on Fourth street on this side of the river is very steep after you strike Taylor street.

Q. What is the steepest grade on Fourth street?

A. From Harrison street this way three and three-quarters per cent, one ninety-eight feet in a mile.

Q. Is that what would be known as a heavy grade?

A. Considered a pretty heavy grade. When I commenced to work there they thought eighty feet was about as high as would like to go.

Q. Is this more than eighty?

A. Two and a half times, almost.

Q. In railroading is that considered a practical grade for use?

A. It would not be for any considerable distance, but the railroad company simply could not lower the grade much more than they did. They had the grade improved—the original grade was very much heavier—came in front of St. Mary's Academy I think two and a half feet. There is a stone wall constructed there, and they had to build underneath that a block on this side—George W. Long owned it two blocks this side. He had a stone wall probably three

feet high and the grade was changed by the fill so it buried one end of the wall.

Q. Do you absolutely know what particular effect it would have on the east side line by diverting the traffic from the Fourth street line on to it, bringing it in that way across the Oswego cut-off—if you know.

A. In what way?

Q. As affecting the property and distance.

A. It would make that much heavier traffic—being warehouse property would probably not seriously interfere. If they had goods coming to the west side that they wanted there, of course it would be a benefit to them to land them in front of the warehouse.

Q. Do most warehouses on the east side of the river have side tracks?

A. All of them.

Q. From the Southern Pacific?

A. All have side tracks.

Q. The nature of the business is such that they must be near the line?

A. It saves heavy expense in hauling to load close to the warehouse.

Recross-examination:

Q. The wholesale district on the west side of the river north of Hoyt street is served by side tracks or spurs connected with the terminal company's yard, isn't it?

A. Anywhere down there?

Q. Anywhere down there.

A. Yes, between Thirteenth, Fourteenth and Fifteenth.

Q. No trouble getting to side tracks to warehouses at the west side of the river with all the east side business if desired?

A. No, I presume not.

Q. The effect of taking the freight business off Fourth street, and throwing it on to the other side of the river would be that the business of the West Side would have to cross the river twice, once at Oswego and once here.

A. The West Side—

Q. The same way with the passenger traffic too?

A. Yes sir.

Q. Now, there was one thing I wanted to ask you. When was this change of grade made you speak of there to relieve the difficulty of getting up that hill?

A. By referring to memoranda I can tell you when it was.

Q. And at whose instance was it made, whether it was made at the instance of the city of Portland—

A. By Ordinance No. 10064, providing for change of grade on Fourth Street.

Q. When was that passed?

A. September 9, 1871.

Q. An old ordinance?

A. September 9, 1871, was approved changing the grade of Fourth and approving the bond of the Oregon and California Railroad Company. Then the improvement of the street followed after that.

Q. Wasn't there a change made after you became City Engineer in front of the Weinhard Block, the saloon right across from the city hall to accommodate the Weinhard estate, and also at the instance of the city to reduce that grade?

A. I don't know of any change being made there.

Q. You don't remember.

A. I think the railway company at the present time are probably above grade.

Q. There is where the steep point begins on Taylor street, just north of the court house block?

672 A. That is where the heavy grade commences.

Q. No business on Fourth street north of Taylor, except the city hall, South of Salmon, I mean—which is the street next the Courthouse?—excepting the City Hall, the Court House, and the Weinhardt Block, used for lodging houses, and saloon diagonally across from the City Hall, is there?

A. Yes, there is a marble shop—cutting monuments, right across from the City Hall.

Q. Where?

A. East side of Fourth street, adjoining the Weinhardt block.

Q. Just a marble shop on the ground?

A. Tombstones.

Q. With that exception no business South of Salmon street?

A. Jones' Lumber Yard.

Q. In South Portland?

A. The corner of Fourth and Columbia.

Q. A distributing yard?

A. Yes, sir.

Q. With that exception, most of it is residence?

A. Well, a grocery store on the northwest corner of Fourth and Montgomery.

Q. Any other business?

A. I think that is practically all until you get way past on Lincoln street. There is a grocery store there, on the northwest corner.

Q. Anything further out?

A. On the northeast corner of Sherman street there is a grocery store and meat market; a store also on the northwest corner of Sherman and Fourth.

673 Q. That character of business that follows a residence district?

A. Yes, all light business.

Q. Now, the block between Taylor and Salmon, hasn't that a brick building, occupying the 50 x 50 owned by Mrs. Church?

A. I think there is a small brick building—John Maegley has a little office.

Q. A one-story temporary brick building, built by Mrs. Murphy.

Senator Gearin's sister's property—Mrs. Murphy at the corner of Fourth and Taylor?

A. No; I think a small brick building upon Taylor and Salmon—I am not sure about that.

Q. On the east side of Fourth street?

A. Yes.

Q. Occupied by what?

A. I think there is a bakery there, or what used to be a repair shop, plumbing, and so forth, whatever it is. It is of very flimsy character.

Q. The only business between Taylor and Salmon on the other side is a saloon on the corner of Fourth and Salmon, a cleaning establishment next to the vacant lot, two old residences on Block 59—old residences on Lot 1, Block 59, West side of the street, owned by Edward Huston, on the East side one hundred feet owned by George Myers, or owned by Feldenheimer, occupied by an old residence, then a quarter of a block North of that belonging to the Blumauer estate and George W. Simon, covered by old residences occupied by a cheap class of business—is that not true?

A. Yes.

674 Q. Between Taylor and Yamhill, on the east side, one brick building on Fourth Street, owned by D. S. Stearns, occupied by the Rubber Company?

A. Only one.

Q. The west side between Yamhill and Taylor is a little brick, one story real estate office, and the rest wooden buildings entirely?

Q. Just got a brick front.

Q. Just veneered?

A. Wooden building and brick front.

Q. Barbey has his locksmith shop and Mrs. Teal owns the quarter block on the corner of Fourth and Yamhill, occupied by a paint shop and a cheap class of business at the present time?

A. Store on the corner.

Q. Between Morrison and Yamhill, on the corner of Yamhill, is the building formerly used as the Y. M. C. A., owned by J. N. Healey—that is brick, three stories high, then comes the building occupied by A. B. Steinbach & Company. Is that right?

A. Yes.

Q. That is right?

A. That is right.

Q. Across the street east, Senator Selling's store that he fitted up three or four years ago as a clothing establishment?

A. That is right.

Q. And then north of that is the Blumauer corner, 100 feet square, occupied by Mr. Gray, on 50 x 100 for his gent's furnishing goods in cabinets, and ladies' dresses, apparel for ladies, and next that is the Swetland candy store, fitted up at very great expense, on the inside lot of the Blumauer corner?

A. Faces on Morrison.

675 Q. Faces on Morrison. Now, at Fourth and Morrison there is no grade, practically, is there? Fourth street is nearly level?

A. Some grade, but not to amount to a great deal.

Q. About what per cent would you think? Less than one per cent?

A. From Morrison to Yamhill?

Q. Well, say Alder to Morrison.

A. It is a light grade from Morrison north.

Q. And the grade becomes heavier at Taylor?

A. Heavier. Very light grade, Morrison to Taylor, and a heavy grade beyond Taylor.

Q. There have been no new buildings built in that section like there has been north of Morrison on Fourth in recent years, except the Dave Stearns building?

A. That is about the only one.

Q. That used to be Whitechapel in this City years ago, between Third and Fourth and Morrison and Salmon, where the saloons and houses of ill-fame were put?

A. Yes, some there—scattered.

Q. Known as Whitechapel in the early days here?

A. I don't know as Fourth street was; Third street was more so, and the northeast corner of Fourth and Taylor had a bad reputation.

Q. But later transferred down to north of Burnside?

A. Yes.

Redirect examination:

Q. Do you know where Mr. Fenton's property is, along there?

A. On Fourth?

Q. Near Fourth, at Salmon.

676 A. I know the piece of property. That used to belong to Mr. Davis. It was afterwards purchased by Mrs. Church.

Mr. FENTON: She still owns it; the lot I am interested in is Lot 2, Block 59—50 feet south of Taylor, on the West side of Fourth.

A. Used to be Amory Holbrook.

Mr. KAVANAUGH: Where is it?

Mr. FENTON: Fifty feet south of Fourth and Taylor—the lot formerly owned by Rodney Glisan.

Mr. KAVANAUGH: Where the little houses are?

Mr. FENTON: Two little houses.

Q. Do you know where the property is in there, owned by Gevurtz?

A. No, I don't. That is the property that used to belong to Amory Holbrook.

Q. Do you know where Mr. Morris' property is?

A. H. A. Morris?

Q. Yes.

A. No, I don't know where he owns.

Mr. FENTON: Lot 3, next to Mrs. Church.

Witness excused.

677 HARVEY O'BRYAN, a witness called on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. O'Bryan, how long have you lived in Portland?

A. 22 years.

Q. What is your business?

A. Insurance.

Q. How long have you been in that business?

A. Sixteen years.

Q. Fire insurance?

A. Yes, fire insurance.

Q. I will ask you, Mr. O'Bryan, whether you have examined and whether you are acquainted with the buildings on Fourth street from its northern extension up through the City of Portland.

A. Yes, I am quite familiar with them, having insurance on almost all of them, scattered all along, and from making inspections at various times.

Q. I will ask you whether you made any special investigation before this trial.

A. Yes, I have maps which I have checked over and made a rough key of the blocks, and have inspected the buildings to verify the same.

Q. Have you made a list of the buildings and the dimensions?

A. Yes.

Q. Who they are occupied by?

A. Yes, sir.

Q. And the character of the business on Fourth street?

A. Yes, sir.

678 Q. Have you that with you?

A. Yes, sir.

Mr. KAVANAUGH (taking paper from witness): Would you like to have all of this read?

Mr. FENTON: If he will say that it is correct, we would just as soon use that.

Mr. FENTON (to witness): This statement that you made is correct, Mr. O'Bryan?

A. Yes, sir.

Mr. FENTON: And if you are asked about each particular item you would say on oath it was correct?

A. Yes, sir.

Mr. FENTON: Then that may be admitted.

Mr. KAVANAUGH:

Q. How far does this extend, Mr. O'Bryan?

A. From the terminal yard on each side of the street, about the commencement of the north end of the so-called railroad bridge, to Sheridan—between Sheridan and Baker Streets.

Mr. FENTON: Is that all the residences and all the business houses?

A. Yes, sir.

Mr. FENTON: Does it describe them as residences or as business?

A. Yes, sir.

Mr. FENTON: I have no objection to that being offered and considered as testimony.

(The following is accepted as the direct examination of Mr. O'Bryan.)

Between Terminal Yard and Glisan Street.

West Side:

679 3 and 2-story frame building, 100 x 100 feet, occupied by Wadhams & Kerr Brothers' Wholesale Grocery House.

Between Hoyt and Glisan Street.

West Side:

4-story brick, 200 x 100 feet, occupied by the Union Meat Company.

East Side:

1 and 3-story frame buildings, adjoining and communicating, 200 feet x 75 and 100 feet; occupied as machinery plant, warehouse and laundry.

Between Glisan and Flanders Street.

West Side:

At the Southwest corner of Fourth and Glisan Streets, a 3-story brick, 50 x 100 feet, occupied by the Pacific Coast Construction Company warehouse.

Northwest corner of Fourth and Flanders Streets, 3-story brick, Chinese occupancy, 200 x 100 feet.

East Side:

Southeast corner of Glisan and Fourth Street, two brick buildings, 1 3-story, 50 x 50, occupied —; 2-story building, occupied as candy factory and soap factory, building 50 x 100 feet.

Northeast corner of Glisan and Flanders Streets, one and 2 story brick and frame building, occupied by Ben Trenkman & Co., sheet iron works.

Between Flanders and Everett Street.

West Side:

3-story brick, 200 x 100 feet, all Chinese occupancy.

East Side:

680 Northeast corner of Fourth and Everett Streets, frame building 50 x 100 feet, saloon and lodgings. From Flanders

Street South 150 feet are four 1 and 2-story frame buildings, occupied by saloon and lodgings.

Between Everett and Davis Streets.

West Side:

Southwest corner of Everett and Fourth Streets, 100 x 100 feet, seven 1 and 2-story frame buildings, occupied as saloons and lodgings.

Northwest corner of Fourth and Davis Streets, 3-story brick, 100 x 100, occupied as general storage.

East Side:

Between Everett Street and Davis Street are four 2-story frame buildings, average size of 50 x 75 feet, occupied as saloons, stores and lodgings.

Between Davis and Couch Streets.

West Side:

In this block are 200 feet x an average of 100 feet in depth of 2 and 1-story frame buildings occupied as saloons, Japanese stores, and blacksmith and cabinet shops.

East Side:

Southeast corner of Fourth and Davis Streets, 3-story frame building running 200 feet East and West, and 100 feet North and South; Stores, saloons, restaurants, etc. on ground floor, lodgings in second and third floors. Building known as Paris House.

On Northeast corner of Fourth and Couch Streets are various frame buildings, one to 2-stories in height, all occupying 100 x 100, with stores, saloons, Chinese and Japanese as tenants.

681 Between Couch and Burnside Streets.

West Side:

On Southwest corner of Couch and Fourth Streets is the Overland Hotel, 4-stories, 100 x 100 feet. On the Northwest corner of Fourth and Burnside, is a 3-story concrete hotel building, with stores on first floor, running 200 feet East and West and fifty feet North and South.

East Side:

On the Southwest corner of Couch and Fourth Streets is a two-story brick building, known as Strayer Machine, 50 x 100 feet.

On the Northeast corner of Fourth and Burnside Streets, covering an area of 100 x 100 feet, are various buildings, two and one stories high, occupied as saloons, lodgings above, Japanese and Chinese stores.

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Between Burnside and Ankeny Streets.**West Side:**

On the Southwest corner of Fourth and Burnside Streets is a 2-story brick, 50 x 100 feet, known as the Men's Resort.

On the Northwest corner of Fourth and Andeny is 7 story brick building, 100 x 100 feet, occupied by the Pacific Paper Company.

East Side:

On the 200 x 100 feet are various two and three story combination frame and brick buildings, occupied as saloons, lodgings, Chinese laundries, candy stores and lodgings.

Between Ankeny and Pine Streets.**West Side:**

Southwest corner of Fourth and Ankeny is a 6 story brick building, 130 x 100 feet, occupied by Blake-McFall, Wholesale paper house. (Now under construction.)

On the Northwest corner of Fourth and Pine Streets is a 7-story brick, running 200 feet East and West and 75 feet North and South, occupied by Marshall-Wells Hardware Company.

East Side:

On the Southeast corner of Fourth and Ash Streets are two and three story frame buildings, occupied as blacksmith shop and lodgings. In the middle of the block is a 2-story brick building 175 x 40 feet, occupied as stores on the ground floor, and lodgings on the second floor. In the center of the block is a circular building, 100 feet in diameter, 37 feet high, formerly occupied as the Battle of Gettysburg; now Brunswick-Balke.

Between Pine and Oak Streets.**West Side:**

Southwest corner of Fourth and Pine and Northwest corner of Fourth and Oak is a 7-story Weinhardt Building, occupied by Wadhams & Company, M. Seller & Company and the Goodyear Rubber Co.

East Side:

Southeast corner of Fourth and Pine Streets is a 4-story frame building, 50 x 50 feet, occupied by Chinese, and a 2-story frame store building, 25 x 35 feet, also Chinese occupancy.

Northwest corner of Fourth and Oak Streets, is a 9-story Lewis Building, concrete; under construction; 50 x 100 feet; 2-story frame building North adjoining.

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Between Oak and Stark Streets.

West Side:

Southwest corner is a 6-story office building, 100 feet square, known as the Henry Building. Northwest corner of Fourth and Stark is 100 x 100 feet of 1 and 2-story frame buildings, occupied as stores, saloons, etc.

East Side:

Southeast corner of Fourth and Oak Streets is 11-story concrete Board of Trade Building.

Northeast corner of Fourth and Stark Streets is the 8-story Stone and Brick Chamber of Commerce Building.

Stark and Washington Streets.

West Side:

Southwest corner of Fourth and Stark Streets is a 2-story brick building, occupied by Pantanges Theatre Building, with 2-story frame building South Adjoining.

Northwest corner of Fourth and Washington Streets is a 7-story steel building, known as the Rothschild Building, 50 x 100 feet; North adjoining is the 8-story concrete Building known as the Couch Building.

East Side:

Southeast corner of Fourth and Stark Streets is a 2-story brick building, running 200 feet East and West, and 50 feet North and South; South adjoining is a 3-story brick, 50 x 100 feet. Stores on first floor, lodgings above.

Northeast corner of Fourth and Washington Streets is a 2-story frame 50 x 100 feet, occupied by stores on ground floor, lodgings above; adjoining is a 3-story brick, 50 x 100 feet, occupied by Blu-mauer-Hoch.

684 Between Washington and Alder Streets.

West Side:

Southwest corner, 5-story brick building, known as the Macleay Building, 50 x 100 feet, stores and offices; South, adjoining is a 4-story brick 75 x 100, occupied by Woodard-Clarke.

Northwest corner of Fourth and Alder Streets, various 2 and 3-story frame buildings, covering an area of 75 x 100 feet, occupied as saloons, stores and lodgings.

East Side:

Southeast corner of Fourth and Washington Streets, a 5-story building known as the Washington Building, 50 x 100 feet, occupied by stores and offices; adjoining South 3-story brick, occupied by Lipman & Wolff, 100 x 75 feet.

Northeast corner of Fourth and Alder Streets, a 4-story brick building 100 x 100 feet, known as Hotel Belvedere.

Between Alder and Morrison Streets.

West Side:

Southwest corner of Fourth and Alder Streets, 4-story brick 100 x 100, occupied by Honeyman Hardware Company; South adjoining 2-story frame building, 50 x 100, occupied by Mace.

Northwest Corner of Fourth and Morrison Streets, 3-story brick, 50 x 100 feet, occupied by stores and offices.

East Side:

The Southeast corner of Fourth and Alder Streets, a 5-story brick, known as Hoenstoffer Stores, 50 x 100 feet, stores and offices; south adjoining a 4-store brick building, 50x100, stores and offices.

685 The Northeast corner of Fourth and Morrison Streets, a 3-story brick 100 x 100 feet, stores and offices. R. M. Gray.

Between Morrison and Yamhill Streets.

West Side:

Southwest corner of Fourth and Morrison Streets, a 2-story brick, occupied by Steinbach on ground floor, offices upstairs.

Northwest corner of Fourth and Yamhill Streets, 4½ story building, formerly occupied by the Y. M. C. A., now stores and offices, area 100 x 75 feet; North adjoining is 4½-story brick stores and offices.

East Side:

Southeast corner of Fourth and Morrison Streets, a 3-story brick, 100 x 100 Ben Selling and others on ground floor; offices and lodgings above; South adjoining is a 2-story brick, 50 x 100 feet, Portland Fire Department No. 1.

Northwest corner of Fourth and Yamhill, a 2 and 3-story frame, 50 x 100 feet, saloons and stores on the ground floor and Turner Hall above.

Between Yamhill and Taylor Streets.

West Side:

Southwest corner of Fourth and Yamhill Streets, 100 x 100 feet 1 and 2-story frame buildings, occupied as stores below, lodgings above.

Northwest corner of Fourth and Taylor Streets, 100 x 100 are four frame buildings 1 and 2-stories high, one brick 1-story high, occupied as saloons, stores, blacksmith shops, etc.

686 East Side:

Southeast corner of Fourth and Yamhill Streets, 100 x 75 feet, are one and 2-story frame buildings, occupied as stores; South adjoining, 50 x 100 feet, is a 4-story brick building, occupied by Winslow Rubber Company.

Northeast corner of Fourth and Taylor Streets are two frame buildings and one 1-story brick building, occupied by saloons and stores; 50 x 100.

Between Taylor and Salmon Streets.

West Side:

Southwest corner of Fourth and Taylor Streets, on an area of 100 x 100 feet, are four frame buildings 1 and 2-story; South adjoining, 50 x 100 feet is 2½ story frame building, stores on ground floor, lodgings above.

Northwest corner Fourth and Salmon Streets, a 4-story combination brick and frame store building, 50 x 100 feet.

East Side:

On entire half block 200 feet North and South and 100 feet East and West are the various 1 and 2 story brick and frame buildings occupied as stores, saloons, on ground floor, lodgings above.

Between Salmon and Main Streets.

West Side:

County Court House; 2-story and basement brick building.

East Side:

Plaza.

687

Between Main and Madison Streets.

West Side:

Southwest corner of a 3-story Boarding House, 50 x 50 feet.

Northwest corner of Fourth and Madison Streets are two dwellings and one 1-story store building, all frame.

East Side:

Plaza.

Between Madison and Jefferson Streets.

West Side:

City Hall, being a 4-story and basement stone and brick building.

East Side:

Southeast corner of Fourth and Madison Streets, 50 x 100 feet, 2-story brick building, occupied as hotel; South adjoining, 2-story livery stable, 50 x 100 feet.

Northeast corner of Fourth and Jefferson Streets, on an area of 100 x 100 feet, four 2-story frame dwellings.

Between Jefferson and Columbia Streets.**West Side:**

Southwest corner are two double dwellings, 2-stories high, each 50 x 50 feet.

On the Northwest corner is a 1 and 2-story lumber shed, 100 x 100 feet.

East Side:

On this half block are eight frame 1 and 2-story dwellings.

Between Columbia and Clay Streets.**West Side:**

688 On the Southwest corner of Fourth and Columbia Streets are various 1-story frame buildings, occupied as tin-shop and marble works.

East Side:

On this half block are nine 1 and 2-story frame dwellings.

Between Clay and Market Streets.**West Side:**

On the Southwest corner of Fourth and Clay Streets are five 2-story frame dwellings.

Northwest corner of Fourth and Market Streets is a lumber yard, occupying 100 x 100 feet.

East Side:

Southeast corner of Fourth and Clay Streets; on this 100 feet are five 1 and 2-story frame buildings.

Northeast corner of Fourth and Market Streets. On the corner is a 2-story frame lodging house, 90 x 75 feet; in rear is a 2-story brick hotel building.

Between Market and Mill Streets.**West Side:**

St. Mary's Academy. Two 2-story frame buildings, one 3½-story brick adjoining and communicating.

East Side:

Southeast corner of Fourth and Market are five 1 and 2-story frame dwellings.

Northeast corner of Fourth and Mill Streets is a 2-story German Baptist Church, two and 1½ story dwellings adjoining.

Between Mill and Montgomery Streets.

West Side:

The Southwest corner of Fourth and Mill Streets is a
689 4-story brick, St. Michael's Church.

On the Northwest corner of Fourth and Montgomery Streets are three 1 and 2-story frame dwellings.

East Side:

On the Southeast corner of Fourth and Mill Streets are three 1½-story dwellings and one 2-story dcuble flat.

Northeast corner of Fourth and Montgomery Streets, two 2-story frame dwellings, one 2-story frame building, Truck and Engine No. 4, latter being 50 x 100 feet.

Between Montgomery and Harrison Streets.

West Side:

Southwest corner of Fourth and Montgomery Streets are two 2½-story frame flats; 2-story frame building in rear.

Northwest corner, 1½-story frame dwelling.

East Side:

On this half block are three double 2-story frame flats and three 2-story frame dwellings.

Between Harrison and Hall Streets.

West Side:

On this half block are two 2-story frame dwellings, and a 2½-story frame dwelling.

East Side:

On this half block are seven 2-story frame dwellings.

Between Hall and College Streets.

West Side:

In the center of the block, a 2-story dwelling.

690 East Side:

On this block are four 1-story frame dwellings and four 2-story frame dwellings.

Between College and Lincoln Streets.

West Side:

This is a double block 400 feet long, on which are 11 1-story frame dwellings and three 2-story frame dwellings.

East Side:

Also a double block, on which are two 2-story double flats and six 1 and 2-story frame dwellings.

Between Lincoln and Grant Streets.

West Side:

On this block are five one and 2-story frame dwellings.

East Side:

On this half block are 5 one and 2-story frame dwellings.

Between Grant and Sherman Streets.

West Side:

On this half block are five 1-story frame dwellings, and one 2-story store building, 25x80 feet.

East Side:

On this half block are six 1 and 2-story frame dwellings, one 1-story building used as a carpet-cleaning establishment and one 2-story frame grocery and meat store.

Between Sherman and Caruthers Streets.

West Side:

On this half block are eight 1 and 2-story frame dwellings.

691 **East Side:**

On this half block are four 1 and 2-story frame dwellings.

Between Caruthers and Sheridan Streets.

West Side:

On this half block are six one and 2-story frame dwellings, one 2½-story frame flat building and one 1-story store building, occupied as a grocery.

East Side:

On this half block are four 1 and 2-story frame dwellings and one 1-story double dwelling; 2-story frame store building, occupied as butcher and grocery store, the latter being 50x50 feet.

Between Sheridan and Baker Streets.

West Side:

The southwest corner of Fourth and Sheridan Streets, 2-story frame store building, 50x50 feet, occupied as saloons and stores on ground floor; lodgings above. Also seven 1-story dwellings.

East Side:

On this half block are nine 1 and 2-story frame dwellings.

This takes it down to the turn.

Cross-examination.**Questions by Mr. FENTON:**

— As I understand, Mr. O'Bryan, this is as it is at the present time?

A. Yes, sir; the Board of Underwriters have just issued a new map, which is drawn to scale and is made by surveyors, of every block in the city and every building as shown on this map. It is here. It gives the exact size and height construction, etc., on both sides of the street—of Fourth Street—and is a correct map.

Q. This 11 story concrete Board of Trade Building, when was that built?

A. 1908.

Q. When was the Henry Building built?

A. It was finished in September, 1909.

Q. When was the Rothchild Building built?

A. That was finished in 1907.

Q. When was the Macleay Building built, occupied by Woodward, Clark & Company.

A. That was—I don't remember the exact—

Q. Several years ago?

A. Yes, at least ten years ago.

Q. When was the building at Fourth and Alder occupied by the Honeyman Hardware Co. built?

A. About ten years ago.

Q. When was the building occupied by A. B. Steinbach & Co. built?

A. About twelve years ago.

Q. When was the building occupied by Ben Selling at Fourth and Morrison built?

A. I think that was over twenty-two years ago at least.

Q. That is an old building?

A. Yes sir.

Q. When was the Y. M. C. A. Building built, now owned by J. N. Healy, at Fourth and Yamhill?

A. Eight years ago.

Q. When was the Stearns Building on the East side of Fourth Street between Yamhill and Taylor built?

693 A. 1907.

Q. That is a three or four story brick?

A. Yes. I have the exact height there.

Q. Is it three or four?

A. That is a four story building 50x100 occupied by the Winslow Rubber Co. and owned by David Stearns.

Duration of Franchise.

SEC. 15. All rights and privileges hereby conferred shall expire at the end of twenty-eight years from the date of the time this ordinance takes effect.

* * * * *

Approved November 18, 1892.

Mr. FENTON: I offer ordinance No. 8156.

(Compilation of 1895.)

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception saved.

Ordinance No. 8156 marked Complainant's Exhibit 4E.

COMPLAINANT'S EXHIBIT 4E.

Ordinance No. 8156.

An Ordinance Granting to the Portland Consolidated Street Railway Company, its Successors and Assigns, the Right and Privilege to Extend its Lines of Railway upon Certain Streets of the City of Portland and to Construct, Maintain and Operate Railways and Poles and Wires and Cables in and upon Certain Streets in the City of Portland.

The City of Portland does ordain as follows:

Franchise—Route.

SEC. 1. The right and privilege is hereby granted to the Portland Consolidated Street Railway Company, its successors and assigns, to lay down, maintain and operate a single track or double track railway, at the option of said company, with power at any time
875 to change from one to the other, except as hereinafter provided, with the necessary switches, side tracks, turnouts and turntables, and to operate cars thereon upon the following named streets, within the limits of the city of Portland, to-wit:

Upon Union Avenue the entire length thereof; upon East Burnside Street from Union Avenue and there connecting with its railway on said Union Avenue to the Willamette river; upon Burnside street from the Willamette river to and into Washington street and connecting with its line of railway laid down upon said Washington street; upon Thirteenth street from Washington street, and thence connecting with its present railways to Burnside street, and there connecting with its line of railway to be constructed upon said Burnside street; upon East Oak street from Union Avenue and there connecting with its railway upon said Union Avenue to the Willamette river; upon West Washington street from Union Avenue and there connecting with its railway to be constructed upon Union Avenue to the Willamette river; the rails of said street railway on all streets

on the east side of the river south of Morris street, and on the west side of the river on Burnside street from Washington street to the Willamette river, shall be laid on iron chairs of such height and form as may be prescribed by the common council; and on East Burnside street on the east side of the Willamette river west from the east line of Union Avenue to the Willamette river; and on Burnside street on the west side of the Willamette river from Park street to said river a double track shall be laid; and upon said streets and parts of streets last mentioned, said double track shall be continuously maintained during the life of this franchise, and 876 said Portland Consolidated Street Railway Company shall not have the option of laying a single track thereon or offering or changing said double track to a single track.

* * * * *

Duration of Franchise.

SEC. 6. The rights, privileges and franchises by this ordinance granted to and conferred upon said Portland Consolidated Street Railway Company, its successors and assigns, shall continue, exist and remain in force for the period of thirty years from and after the approval of this ordinance.

Approved February 16, 1893.

877 OSCAR BRUN, a witness called on behalf of the complainant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— I show you a map showing the lines of railroad of the Southern Pacific Company, and the O. R. N. Company in the City of Portland, called railroad map of Portland, Oregon, showing the tracks of the Southern Pacific Company in red; the Northern Pacific Terminal Company, for use in common, in hatched white lines; the Northern Pacific Terminal Company, leased to the O. R. N. Company, in white lines; the O. R. N. Company in yellow lines; the Northern Pacific Railroad in black lines; and ask you if that is a correct map—railroad map—of the City of Portland, as relating to connections with the Fourth Street Lines.

A. Yes, sir.

Mr. FENTON: I offer this map.

Mr. KAVANAUGH: What is your position?

A. I am Chief Draftsman for the O. R. N.

Mr. KAVANAUGH: No objection.

Map marked Plaintiff's Exhibit 4F.

Q. I show you a map showing the Southern Pacific Company's lines on the East Side of the River, with connection from Beaverton-Willaburg line at Oswego, and will ask you if that is a correct map

of the proposed line from Oswego to Willsburg and thence into—on the main line of the Southern Pacific, into the terminals.

A. Yes, sir.

878 Q. I call your attention to the fact that this map, where the words are "To Beaverton" does not show the mileage from that point to Beaverton; you have nothing showing that?

A. Yes, I do have, but I was only requested to show from Oswego to Willsburg.

Q. What is the distance from the point of connection at Beaverton, or Beaverton-Willsburg cutoff, as it is called, to the intersection of the main line at Willsburg?

A. That is ten miles.

Mr. KAVANAUGH: I object to that as a matter already testified to. Several witnesses have already testified to that.

Mr. FENTON: I just want to verify it.

Court: I think it has been by two or three witnesses.

A. Ten and a half miles.

Q. And what is the distance from Willsburg in to the Union Depot on this line?

A. From that connection into the Union Depot would be five-and-a-half miles.

Mr. FENTON: I offer this map in evidence.

Mr. KAVANAUGH: How did you prepare that map? The road is not built yet?

A. It is practically built now; it is being constructed, that is, it is built to Oswego.

Mr. KAVANAUGH: You can offer that, subject to objection. Map marked Plaintiff's Exhibit 4G.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Does the Beaverton Cutoff—is that what you call it, or Oswego Cutoff?

A. We call it the Beaverton & Oswego Railway.

Q. Does the Beaverton & Oswego Railroad connect with the West Side Southern Pacific?

A. Yes.

879 Q. At what point?

A. Near Willsburg.

Q. On the west side?

A. Oh, west side. Yes, it connects at Beaverton, near Beaverton.

Q. So that the train coming in from Corvallis could swing on to this, around into the depot, across the steel bridge?

A. Yes, sir.

Mr. FENTON: The bridge at Oswego is not built yet?

A. No, sir.

Mr. FENTON: When you say the road is built, you mean the grading and laying of track?

A. Yes, the track is laid to the bridge now.

Mr. FENTON: Is the track laid between Willsburg and Oswego on the east side?

A. No, sir.

Mr. FENTON: Being located or graded now?

A. Being graded now.

Witness excused.

880 Mr. KAVANAUGH: I would like to introduce the United States Census reports of Portland, Oregon, for the years 1860, 1870, 1880, 1890 and 1900. The census for 1860 is 2874; 1870, 8293; 1880, 17,570; 1890, 46,383; 1900, 90,426. These are taken from the official records.

Mr. FENTON: No objection.

Census Reports Defendant's Exhibit No. 10.

Mr. FENTON: I have here and will ask to have marked certified copies of the ordinances heretofore offered in evidence upon the trial. Also certified copy of No. 599. These complete all to be furnished except a list of improvement ordinances which are identified and have already been admitted, and which I will get from the Auditor in a few days, and the pictures which neither of us have gotten. I have also yet to get a certified copy of the map of 1866, adopted by the City of Portland. (Burrage's map, Plaintiff's exhibit "D".) One of the ordinances I have offered is Ordinance of the City of Portland adopting the Burrage map.

Complainant rests.

Defendant rests.

881 And afterwards, to wit, on the 8th day of June, 1910, there was duly filed in said Court, a Stipulation for order to send certain original exhibits to the Supreme Court of the United States, in words and figures as follows, to wit:

882 In the Circuit Court of the United States for the District of Oregon.

SOUTHERN PACIFIC COMPANY, Complainant,

vs.

THE CITY OF PORTLAND, a Corporation, Defendant.

It is hereby stipulated by and between the complainant and the defendant above named, by their respective attorneys, that the court may by order direct the Clerk of this court to send and certify to the Supreme Court of the United States all the original exhibits, maps, plats and other documents admitted in evidence in said cause, which have not been copied or extended in the record made by the official reporter, and that said original exhibits when so certified and

sent to the Supreme Court of the United States, shall be taken and deemed for all legal purposes as copies thereof, to be used upon the trial of said cause in the Supreme Court of the United States.

Dated June 3rd, A. D. 1910.

WM. D. FENTON,
R. A. LEITER, AND
BEN C. DEY,
Attorneys for Complainant.
J. P. KAVANAUGH,

City Attorney and Attorney for Defendant.

Filed June 8, 1910. G. H. Marsh, Clerk, U. S. Circuit Court, District of Oregon.

883 And afterwards, to wit, on Wednesday, the 8th day of June, 1910, the same being the 49th judicial day of the Regular April, 1910, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

884 In the Circuit Court of the United States for the District of Oregon.

No. 3407.

SOUTHERN PACIFIC COMPANY

VS.

CITY OF PORTLAND.

JUNE 8, 1910.

Now, at this day, on motion of Mr. William D. Fenton, of counsel for the plaintiff in the above entitled cause, and upon the stipulation of the parties filed herein, it is ordered that the clerk of this Court transmit to the Clerk of the Supreme Court of the United States the following original exhibits filed in said cause, to wit: Plaintiffs Exhibits "A" "C" "D" "V" "AA" "DD" "EE" "FF" "GG" "HH" "II" "JJ" "OO" "RR" "XX" "YY" "HHH", "4-f", "4-G", Defendant's Exhibits 1, 2, 3, 4, 5, and 6, to be safely kept by the said Clerk of the Supreme Court of the United States and returned to this Court after the final determination of this cause by said Supreme Court.

R. S. BEAN, *Judge.*

Filed June 8, 1910. G. H. Marsh, Clerk, U. S. Circuit Court, District of Oregon.

885 And afterwards, to wit, on Wednesday, the 8th day of June, 1910, the same being the 49th judicial day of the regular April, 1910, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

886 In the Circuit Court of the United States for the District of Oregon.

No. 3407.

SOUTHERN PACIFIC COMPANY

vs.

CITY OF PORTLAND.

JUNE 8, 1910.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the plaintiff, in the above entitled cause, and for good cause shown to the Court, it is ordered that the time within which said plaintiff is required to docket said cause and to file the transcript of the record thereof in the Supreme Court of the United States on the appeal taken by said plaintiff, be, and the same is hereby, extended thirty days.

R. S. BEAN, *Judge.*

887 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, in obedience to the foregoing order allowing appeal, do hereby certify that the foregoing pages numbered from 3 to 886, inclusive, contain a true and complete transcript of the record and proceedings had, and the testimony and exhibits filed, in said Court, in the case of the Southern Pacific Company, a corporation, plaintiff and appellant against the City of Portland, a municipal corporation, defendant and appellee, except that, in accordance with the stipulation of the parties filed in said cause, the exhibits introduced and received in evidence, in said cause, save as the same have been copied into the testimony by the official reporter of said Court, are not transcribed in the foregoing pages.

In Testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 5th day of August, A. D. 1910.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH, *Clerk.*

Endorsed on cover: File No. 22,296. Oregon C. C. U. S. Term No. 377. Southern Pacific Company, appellant, vs. The City of Portland. Filed August 15th, 1910. File No. 22,296.

IN THE
Supreme Court
OF THE
United States

SOUTHERN PACIFIC COMPANY
Plaintiff in Error

VS.

THE CITY OF PORTLAND
A Municipal Corporation,
Defendant in Error

MOTION TO ADVANCE HEARING

Comes now the above named defendant in error and moves the Court that the above entitled suit be advanced to an early hearing for the following reasons:

First: That the determination of the questions involved in this suit are of great public importance to the city of Portland, Oregon, in the matter of regulating railroads.

Second: That it is of the utmost importance to the parties involved in this suit that it be speedily deter-

mined because the question of perpetuity of franchises, the question of property rights, and the question of immediate future franchise rights are directly involved.

WHEREFORE, defendant in error hereby moves the Court that the above entitled suit be set down for hearing during the present term of this Court.

FRANK S. GRANT,
Attorney for Defendant in Error.

AFFIDAVIT ON MOTION TO ADVANCE HEARING

STATE OF OREGON)
)ss.
COUNTY OF MULTNOMAH)

I, Frank S. Grant, being first duly sworn, say, that I am the duly elected, qualified and acting City Attorney of the defendant in error in the above entitled suit, and am acting for and on behalf of said The City of Portland in the above entitled suit; that I am familiar with said suit and the facts and questions involved therein, which facts are as follows;

In January, 1869, the City of Portland, by Ordinance No. 599, authorized and permitted the Oregon Central Railroad Company to lay a railway track and run its cars over the same, along the center of Fourth Street from the southerly boundary line of the City of Portland to the north side of "G" Street (now Glisan Street) in said city. Section 3 of said ordinance provided that the Common Council reserved the right to make or alter regulations at any

time it might deem proper for the conduct of the said road within the limits of the City, and might restrict or prohibit the running of locomotives at such time and in such manner as it might deem necessary. In Section 5 of said ordinance it was expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the requirements of said ordinance, or any other ordinance enacted in pursuance thereof, should be deemed a forfeiture of the rights and privileges therein granted, and that it would be lawful for the Council to declare by ordinance the forfeiture of the same and to cause the rails to be removed from the street. The Oregon Central Railroad Company accepted said ordinance and the plaintiff in error is the successor in interest of said company.

On the first day of May, 1907, the City of Portland enacted Ordinance No. 16491 which prohibited the plaintiff in error from operating steam locomotives or freight cars on Fourth Street from and after 18 months from the final passage or approval of said ordinance. At the expiration of said period the plaintiff in error continued to use steam locomotives on Fourth Street and the general manager of the plaintiff in error was arrested for a violation of said ordinance. A suit was then begun in the Circuit Court of the United States for the District of Oregon to enjoin the City of Portland from enforcing said ordinance, and in the due course of time said case was heard and determined by that court. It was contended by the plaintiff in error that Ordinance No. 16491 is void because it impairs the obligation of a contract (the franchise under which the road was located), and

interferes with vested rights of property; that it deprived the plaintiff in error of its property without due process of law; that it deprived it of the equal protection of the laws, and that it was an unlawful interference with interstate commerce.

It was contended on behalf of the defendant in error that at the time of the enactment of Ordinance No. 599 the City had not power or authority to grant franchises for the use of its streets for railway purposes; that said ordinance was merely a license or permission on the part of the council to the grantee named therein to use the street, which license or permit was revocable at any time; that the grant was personal to the grantee and it had no power or authority to assign or transfer the right thereby granted, without the consent of the City, and that by the terms of said ordinance the city reserved the right to regulate the street for railway purposes to the exclusion of steam locomotives and freight cars thereon whenever, in the judgment of the council, such legislation was necessary or advisable.

The lower court entered a decree adjudging said Ordinance No. 16491 to be a valid exercise of the city's power under the provisions of Ordinance No. 599, and also declared that its provisions were not unreasonable or arbitrary, since it was within the legitimate police power of the municipality, and ordered that the bill of complaint be dismissed. However, the Court entered an order restraining the defendant in error from enforcing said decree until this suit could be finally determined by this Honorable Court.

In 1869 when Ordinance No. 599 was enacted the City of Portland had a population of about 7000 inhabitants, and Fourth Street at that time was an unpaved back street with but a few dwellings along it and no business houses whatsoever. It was considered to be on the outskirts of the town. Today it is in the very heart of the business district and one of the principal business streets in this city. Such buildings as the new courthouse, costing approximately \$1,500,000.00, face this street where the circuit court consisting of five departments and the county court are in daily session; the city hall faces this street; a large number of modern office buildings face this street and facing on it is one of the largest modern hotels on the Pacific coast; vehicles are constantly crossing and passing along said street during business hours and a number of street car lines cross the same. In one portion of the city the grade on this street is very steep so that two locomotives are required to move a train of only four cars; and as was said by the lower court in its opinion "the noise, vibration, smoke, cinders and soot from the steam locomotives seriously interfere with the transaction of public and private business and it is a constant source of danger and inconvenience to the public."

At the time Ordinance No. 599 was enacted the rails on this street were very light and the equipment and cars and locomotives were small as compared to the equipment now used on said street. The evidence in this case was conclusive to the effect that when these trains passed the court house and the city hall it was impossible to transact public business owing to the noise and the jar of the moving trains.

The lower court entered this decree on the 4th day of April, 1910, and the city has been suffering from the condition as outlined herein ever since, and this is one of the reasons why the city desires an early and speedy hearing of this suit so that it may rid itself of this nuisance.

Another reason why this case should be advanced to an early hearing is, that the plaintiff in error has applied to the council of the defendant in error for an amendment to Ordinance No. 599 asking permission to change its motive power from steam to electricity, and to operate electric cars, over and along said street on a double track system.

The present charter of the City of Portland, a legislative act, provides that no franchise can be granted by the Council beyond the period of twenty-five years, and it also provides that all franchises must contain a common user provision. The court will thus see that the Council of the defendant in error is now confronted with serious legal questions, in view of this application of plaintiff in error for an amendment to Ordinance No. 599. If Ordinance No. 599 is not a franchise, but a mere license, and this Honorable Court should sustain Ordinance No. 16491, then the City of Portland contends it would have a right to repeal Ordinance No. 599 and cause the plaintiff in error to remove its rails from the street, and plaintiff in error would be required to comply with the present provisions of the City Charter, and take out a franchise for twenty-five years, and until this question is determined, the rights of the public are not clearly defined and the Council is in no position to act.

I am informed that the record in this suit has been ordered printed by the defendant in error.

Attached hereto and made a part hereof as though read into this affidavit, is "exhibit A."

FRANK S. GRANT,

Subscribed and sworn to before me this 4th day of April, 1912.

H. M. TOMLINSON,

Notary Public for Oregon.

EXHIBIT "A."

STATE OF OREGON

COUNTY OF MULTNOMAH

)
) ss.
)

I, A. G. Rushlight, being first duly sworn, depose and say, that I am the Mayor of the City of Portland, and have been a member of the council for a number of years and was a member of the council at the time it enacted Ordinance No. 16491, referred to in the affidavit of City Attorney Frank S. Grant; that I have been a resident of Portland, Oregon, for a number of years and am familiar with the conditions surrounding Fourth Street and the operation thereon by plaintiff in error of its railroad; that said street is today one of the principal thoroughfares of the City. Many modern and large office buildings are erected along this street. The court house and the city hall face this street. Six street car lines cross it at different intersections. The noise caused by the operation of these trains, and the ringing of the bell of the locomotive is such that it is impossible

to transact any public business in the council chamber in the city hall while such trains are passing.

The grade on this street is exceedingly steep and it requires two locomotives to take up a train of from four to five cars. The smoke and noise is such that it is a nuisance per se.

The company was granted eighteen months' time in which to remove its steam locomotives from said street, but refused to comply with the provisions of the ordinance, and has, by litigation, tied the hands of the city from ridding itself of this nuisance.

The company has made application to the council for an amendment to Ordinance No. 599, but, as I am informed and believe, it does not desire to comply with the present provisions of the city charter, which limits franchise rights to a period of twenty-five years, and which provides for a common user of tracks by other companies upon just compensation being first provided.

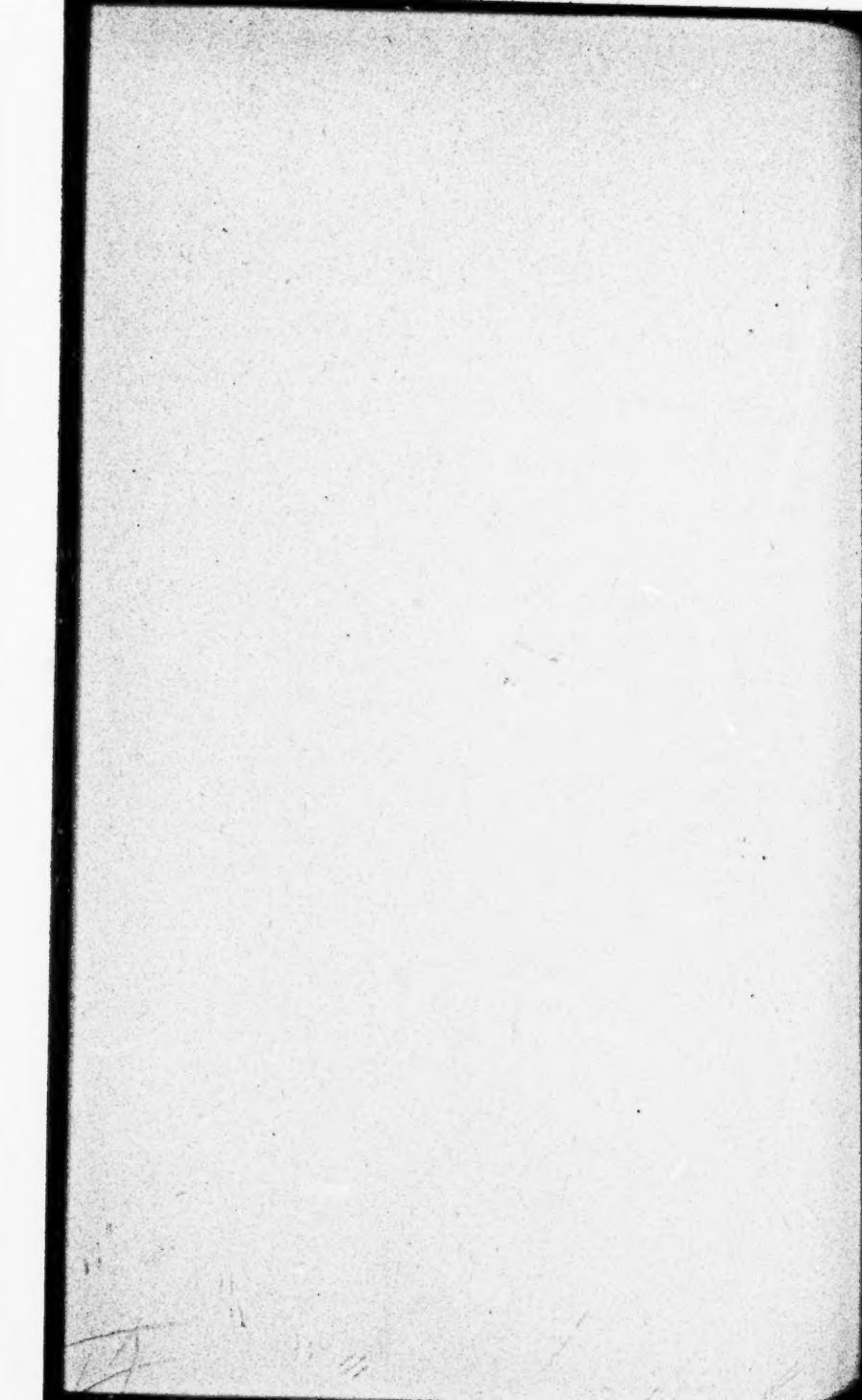
A. G. RUSHLIGHT.

Subscribed and sworn to before me this 4th day of April, 1912.

FRANK S. GRANT,
Notary Public for Oregon.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1912

SOUTHERN PACIFIC COMPANY,
Appellant,

VS.

CITY OF PORTLAND,

Appellee.

No. 120

*Appeal from the Circuit Court of the United States
for the District of Oregon*

BRIEF FOR APPELLANT

STATEMENT

This is an appeal from the decree of the Circuit Court of the United States for the District of Oregon, entered April 18, 1910, dismissing the cause and complaint, and awarding costs and disbursements to the defendant.

The cause was heard upon the pleadings and evidence taken in open court. The testimony is set

out in the Transcript of Record, pages 38 to 478, and all of the exhibits are printed excepting Plaintiff's Exhibits "A," "C," "D," "V," "AA," "DD," "EE," "FF," "GG," "HH," "II," "JJ," "OO," "RR," "XX," "YY," "HHH," "4-f," "4-G," and Defendant's Exhibits 1, 2, 3, 4, 5 and 6. These exhibits are described at pages 39 to 41 of the Transcript of Record.

The bill of complaint, (Pages 2 to 17 Transcript of Record) in substance alleges:

That the complainant is a corporation duly authorized to transact the business of a common carrier by railroad, in Oregon, and as such is in possession of and operating a railroad from its depot and station in the yards of the Northern Pacific Terminal Company, at the north end of Fourth Street in the City of Portland, by way of Fourth Street southerly to Sheridan Street, thence southerly to the south boundary line of said city, and thence by way of Beaverton, Hillsboro, and Forest Grove, to a point at or near McMinnville, thence to Corvallis, Oregon, a distance of 96.5 miles;

That the City of Portland, ever since its incorporation in January, 1851, has been a municipal corporation and political subdivision of the State of Oregon, organized and existing under the laws of said state; and that said Fourth Street is, up to said Sheridan Street, and during all the times mentioned in the complaint, has been a public street within said City of Portland, and that the said

City of Portland, during all the times mentioned in the complaint, has been and now is a citizen of the State of Oregon, and as such claims to have jurisdiction over its streets, including Fourth Street;

After alleging the jurisdictional facts, it is further alleged that the Oregon Central Railroad Company, until January 9, 1906, had been a corporation organized under the laws of the State of Oregon, and as such authorized to construct, operate and maintain the railroad from the City of Portland, southerly, and that in aid thereof, Congress, on May 4, 1870, enacted a statute entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland, Oregon, to Astoria and McMinnville, in the State of Oregon," and by that Act granted to the Oregon Central Railroad Company, its successors and assigns, a right of way through the public lands of the United States, of the width of one hundred feet on each side of said road. The provisions of this Act of Congress are specifically pleaded, together with compliance by the railroad company with the terms and provisions of the Act under which it was entitled to the provisions thereof.

That within the time required by this Act, to-wit, six years from May 4, 1870, and as a part of its completed and fully equipped road, it completed and equipped the first twenty miles thereof, beginning at a point at the north end of Fourth Street at its intersection of North Front Street, in the depot and

station grounds of said company, now within the yards of the Northern Pacific Terminal Company, and so completed and constructed the same under said Act of Congress, and under and pursuant to that certain ordinance of the City of Portland, No. 599, approved January 6, 1869, by way of Fourth Street, to Sheridan Street, and thence southerly over its own right of way acquired by purchase and condemnation, and under said Act of Congress, southerly to a point at or near Hillsboro, Oregon, on or before the 3rd day of January, 1872, and that the Oregon Central Railroad Company operated said line from said point at said north end of Fourth Street, by way of Forest Grove, to the Yamhill River, near McMinnville, Oregon, until on or about the 6th day of October, 1880;

That on January 6, 1869, the City of Portland, under and by virtue of the laws of the State of Oregon, and its charter then in effect, duly passed, and the same was duly approved by the Mayor, Ordinance No. 599, in words and figures as follows, to-wit:

"An Ordinance Authorizing the Oregon Central Railroad Company, of Portland, to lay a railway track and run cars over the same, within the City of Portland.

The City of Portland does ordain as follows:

Franchise—Route.

Section 1. The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and

run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland, to the north side of "G" Street, and as much farther north as said Fourth Street may extend or be extended, upon the terms and conditions as hereinafter provided.

Grade and Repairs.

Section 2. The said railroad company shall grade to established grades, construct and maintain in good repair said street, at least six feet in width upon each side of the center line of said street, and as much wider as may be affected by said railway or the construction thereof, and shall do and perform said work and the improvement and the repair thereof in such manner and as often as the Common Council of the City of Portland may at any time provide for or require.

Section 3. The Common Council reserve the right to make or to alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary.

Section 4. All alterations of grades or streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of the said railroad company, and the same shall be made as may be provided by ordinance.

Section 5. It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pur-

suance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance, the forfeiture of the same, and to cause the said rails to be removed from said street.

Approved January 6th, 1869."

That said ordinance was then and there duly accepted by the Oregon Central Railroad Company therein designated, and the said Oregon Central Railroad Company, its successors and assigns, including the complainant, Southern Pacific Company, as lessee of said property and in the possession and operation of the same, have at all times fully complied with the terms and conditions of said ordinance, and the said Oregon Central Railroad Company, its successors and assigns, have expended, upon the faith of said ordinance, in the construction of said road and in improvements ordered and directed by the said City of Portland, and in the renewal of said road from the north end of said Fourth Street to Sheridan Street, in said city, a sum in excess of \$133,483, and the said Southern Pacific Company, ever since the lease of said property by the Oregon and California Railroad Company, has continuously operated and maintained said railroad on said Fourth Street as required by said ordinance, and as required by the business of said railroad company in operating said railroad from Portland to Corvallis and return;

That on January 6th, 1869, when said Ordinance No. 599 was passed and approved, the charter of

the City of Portland then in effect was the Act of the Legislative Assembly of October 14th, 1864, found at pages 3 to 31 of the Session Laws for that year;

That on October 14th, 1862, the Legislative Assembly of the State of Oregon duly passed, and the same was approved by the Governor, an act entitled, "An Act providing for private incorporations and the appropriation of private property therefor." Section 24 of that Act was and is Section 5077 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, and Section 25 of said Act was and is now Section 5078 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, which are now Sections 6841 and 6842 of Lord's Oregon Laws, as follows:

"Section 6841. Public Grounds, Streets, etc., May be appropriated.

When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road."

"Section 6842. Streets, etc., in Corporate Towns, Proceedings to Appropriate.

Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, or alley, or public grounds, within such town as the local authorities mentioned in the last section and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

The Act of October 14th, 1862, containing among other provisions, the above sections, took effect pursuant to Section 51 thereof, which is as follows:

"Owing to the necessity of certain corporations being formed under this Act immediately, so as to commence operations before the winter rains set in, this act shall take effect and be in force from and after its approval by the Governor."

The bill of complaint further alleges the incorporation of the Oregon & California Railroad Company under the laws of Oregon, on March 16, 1870, and that it has ever since been and is now such corporation, authorized to construct, operate, acquire, own, hold, use, and lease its railroads and other property and franchises owned by it in the State of Oregon, and that on the 6th day of October, 1880, the Oregon Central Railroad Company, being

duly authorized, sold, assigned, transferred and conveyed to the Oregon & California Railroad Company, authorized to accept and receive the same, all the property of the Oregon Central Railroad Company, including its line of railroad then constructed extending from Portland to St. Joseph, Oregon, a point on the Yamhill River at or near McMinnville, in the State of Oregon, together with its rights and franchises, including the said franchise granted under said Act of Congress, and including the said franchise granted to said Oregon Central Railroad Company under Ordinance No. 599, aforesaid, and including said railroad track on said Fourth Street; and the Oregon & California Railroad Company, ever since October 6th, 1880, and up to the first day of July, 1887, continuously operated and maintained said railroad and tracks, commencing at the north end of Fourth Street, as aforesaid, thence on Fourth Street to Sheridan Street, thence southerly to Corvallis by way of Forest Grove and McMinnville; and the said City of Portland, during all said times, recognized the said Oregon & California Railroad Company and the said Southern Pacific Company under its lease, as rightfully in the possession of said franchise on said Fourth Street, and as obligated to perform the conditions of said Ordinance No. 599, and as entitled to the benefits and burdens of the franchise thereby granted, and so continued to recognize said rights and to impose said burdens until on or about the passage of that certain pretended ordinance No.

16491, entitled, "An Ordinance prohibiting the operation of steam locomotives and freight cars on Fourth Street between Glisan Street and the southerly limits of the City of Portland, after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof," which said ordinance was passed May 1, 1907;

That on July 1, 1887, the Oregon & California Railroad Company duly assigned, transferred and leased to complainant, for the term of forty years from that date, its lines of railroads, including the line of the Oregon Central Railroad Company and the Oregon & California Railroad Company from its northerly terminus at the intersection of Fourth Street and North Front Street, in the City of Portland, along Fourth Street to Sheridan Street in said city, thence by way of Beaverton, Hillsboro, Forest Grove and McMinnville, to Corvallis, together with all the rights and franchises granted to the Oregon Central Railroad Company under said Ordinance No. 599, and that complainant thereupon entered into the open, notorious and exclusive possession of said railroad and franchises and rights granted under said Ordinance No. 599, and has ever since been and is now operating and maintaining as a common carrier for hire, and serving the people and business of the counties of Multnomah, Washington, Yamhill, Polk and Benton, in the State of Oregon, the said railroad between said points, over

said Fourth Street, and during all said times operating steam locomotives and cars over the same, as required and authorized by law;

That notwithstanding the passage of Ordinance No. 599, and its acceptance by the Oregon Central Railroad Company, its successors and assigns, and the operation of said railroad over said Fourth Street in accordance with its terms, the Common Council of the City of Portland attempted to pass, and did pass, on May 1, 1907, Ordinance No. 16491, in words and figures as follows:

"An Ordinance prohibiting the operation of steam locomotives and freight cars on Fourth Street between Glisan Street and the southerly limits of the City of Portland, after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof.

"The City of Portland does ordain as follows:

"*Section 1.* It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, or other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after eighteen months from the final passage or approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.

"*Section 2.* Any violation of the provisions of this ordinance by the owners, officers, agents or employees of said Oregon Central Railroad Company, or its successors, assigns, or lessees or any other person, firm or corporation, by so running or operating steam locomotives or

freight cars (other than those excepted in section 1 hereof), or attempting to run or operate the same on said Fourth Street after the time mentioned in section 1 of this ordinance, shall be punishable by a fine of not less than \$250.00 nor more than \$500.00, or by imprisonment for nor more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotives or freight cars, shall constitute a separate offense and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.

"Section 3. This ordinance shall not be construed so as to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway, or the use, operation or running of any railway car or cars, motor or motors, locomotive or locomotives, or other railway vehicle or vehicles in, on, over, along or upon said Fourth Street heretofore, now or hereafter claimed, alleged or set up by any person, persons, firm or corporation."

That on Nov. 16, 1908, the city, acting by and through its City Attorney and Chief of Police, caused to be filed in the Municipal Court of the City of Portland, a criminal complaint charging the Southern Pacific Company and its General Manager, James P. O'Brien, with a violation of Ordinance No. 16491, in that the company, on November 16, 1908, and its Manager, as such officer, wilfully and unlawfully ran and operated steam railway locomotives upon and along Fourth Street, between the south boundary line of said city, and the south line

of Glisan Street in said city, and within the corporate limits of the city, contrary to the provisions of this ordinance.

That pursuant to this complaint the Municipal Court caused to be issued a warrant for the arrest of James P. O'Brien, the General Manager of complainant, and the Chief of Police caused his arrest; thereupon, upon the appearance of said James P. O'Brien in court in person as well as by his counsel, he was allowed to go upon his own recognizance, and the case was continued for further hearing, and the same is now pending in that court.

It is alleged that the City of Portland, acting by and through its Mayor and Chief of Police, threatens to and will unless restrained by the court, cause other complaints to be filed charging the Southern Pacific Company and its General Manager with pretended violations of Ordinance No. 16491, of like tenor and effect, and will unless restrained, annoy, vex and harass the complainant and its General Manager with a multiplicity of criminal actions for the pretended violation of this ordinance, thereby intending to and trying to prevent the operation of the trains of the complainant, and particularly its motive power used in the operation thereof, to-wit, the steam engines over and upon and along said Fourth Street in said City of Portland, and all freight trains or cars;

That heretofore the Legislative Assembly of the State of Oregon duly enacted an act to incorporate

the City of Portland, approved January 23rd, 1903, and the said City of Portland ever since has been and is now acting under the terms and provisions of said Act, and is demanding that the said Southern Pacific Company discontinue the operation of its said trains under said Ordinance No. 599, and accept and receive from said City of Portland, under said charter, an ordinance for a limited term by which said Southern Pacific Company may be permitted to operate and move street cars and other passenger cars on and over said Fourth Street by means of electrical power, and not otherwise, and for which it shall pay an annual revenue to the City of Portland for said franchise, which said sum so to be paid is required to be exacted by said charter as special revenue, and not as a license or privilege tax, but that under said proposed ordinance said Southern Pacific Company would not be permitted to operate its railroad trains and move its freight over its line of railroad from Corvallis to the northerly end of said Fourth Street, and along Fourth Street, or to operate any trains on said Fourth Street moved by steam engines, nor to move any freight thereon whatsoever.

The special provision of the charter of the City of Portland, under the Act of January 23, 1903, referred to, is as follows:

"The Council has power and authority by ordinance, duly passed, to agree with any corporation, firm or person constructing a commercial railroad and desiring to enter the city, upon the extent, terms and conditions upon

which the streets, alleys or public grounds of the city may be appropriated, used or occupied by such railroad, and upon the manner, terms and conditions under which the cars and locomotives of such railroad may be run over and upon such streets, alleys, and public grounds; such agreement shall be subject to the provisions and requirements of Sections 95, 97, 100 and 101 of this charter. No exclusive right for the aforesaid purposes shall be granted to any corporation, firm, or person, and the use of all such rights shall at all times be subject to regulation by the Council. In addition to the other requirements of this charter every ordinance granting such right shall be upon the condition that such grantee shall allow any other railroad company to use, in common with, the same track or tracks upon obtaining the consent of the Council, expressed by ordinance, each paying an equitable and proper portion for the construction and repair of the tracks and appurtenances used by such railroad companies jointly."

It is further alleged that there is no other provision in the charter under or by which a commercial railroad can acquire the right to construct and operate a railroad upon the streets, alleys or public grounds of said city, and if Ordinance No. 16491 is enforced and enforcible, it will be impossible for complainant to operate any railroad from the intersection of Sheridan Street with said Fourth Street to its station and terminals at the intersection of Fourth Street with North Front Street, in said city, and complainant will be compelled to discontinue the operation of its trains into the City of Portland,

thereby causing great and irreparable damage to its business and to the public;

That said complainant has not, nor is it possible to obtain or provide any terminal, station, or siding at any point within the city along the line of its said railway, or accessible thereto, from the intersection of Sheridan Street with Fourth Street, to the south boundary limits of said City of Portland, and that the trains of complainant, from Corvallis and all points between Portland and Corvallis, could not be operated or brought into said city, or its business as a common carrier conducted, if said Ordinance No. 16491 is enforced or enforceable, excepting by construction of about 10.17 miles of railroad from Beaverton, via Oswego, across the Willamette River, to Willsburg, Oregon, at the estimated cost of \$911,-314.37, and thence to the east end of the Steel Bridge across the Willamette River, owned by the Oregon Railroad and Navigation Company, and thence across said river to the intersection of Fourth Street with North Front Street, by the northerly terminus of said railroad constructed by the Oregon Central Railroad Company;

That in and by the Act to incorporate the City of Portland of January 23, 1903, it was provided by Section 106 thereof as follows:

"All franchises or privileges heretofore granted by the city, which are not in actual use or enjoyment, or which the grantees thereof have not in good faith commenced to exercise, are hereby declared forfeited and of no valid-

ity, unless said grantees or their assigns shall, within six months after this charter takes effect, in good faith, commence the exercise or enjoyment of such grant or franchise. Nothing in this charter contained shall affect the validity of any franchise, right or privilege in actual use or enjoyment heretofore given or granted by any former or the present city of Portland, or by the City of East Portland, or by the City of Albina, and the same shall be and continue in force and effect as given or granted by said cities or either of them."

And it is alleged that at that time, and when said charter took effect, the complainant was then and there operating its line of railroad over said Fourth Street, as aforesaid, under said Ordinance No. 599, and was in the enjoyment of the franchise thereby granted;

That the Oregon Central Railroad Company being thereunto duly authorized, on October 6, 1880, so executed its deed to the Oregon & California Railroad Company in consideration of the covenant and agreement upon the part of the Oregon & California Railroad Company, its successors and assigns, that they would pay or cause to be paid and discharged all lawful indebtedness of the said Oregon Central Railroad Company, which then exceeded the full value of the property conveyed, and which said indebtedness has been fully paid and discharged by the said Oregon & California Railroad Company; and the said conveyance was authorized by the unanimous vote of the stock-

holders and directors of said Oregon Central Railroad Company authorizing the dissolution of said Oregon Central Railroad Company, the settling of its business and disposing of its property, as provided by Sections 5068 and 5070, 11 Bellinger & Cotton's Annotated Codes and Statutes of Oregon, then in effect, and that then and thereby, and by virtue of said conveyance and said resolutions authorizing the dissolution of said Oregon Central Railroad Company, the said Oregon & California Railroad Company acquired all the property, franchises and rights of the Oregon Central Railroad Company, including its rights and franchises granted by said Ordinance No. 599, as aforesaid.

Sections 5068 and 5070, 11 Bellinger & Cotton's Annotated Codes and Statutes of Oregon, are now Sections 6699 and 6701 Lord's Oregon Laws, but when said dissolution was effected, and said conveyance made, were as follows:

"Section 5068. Corporations continue, after dissolution, for certain purposes. All corporations that expire by limitation specified in their Articles of Incorporation, or are dissolved by virtue of the provisions of Section 5070, or are annulled by forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending actions, suits, or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business."

"Section 5070. Majority may determine

amount of stock or dissolve corporation.—Any corporation organized under the provisions of this chapter may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business and disposing of its property, and dividing its capital stock in any manner it may see proper."

It is further alleged that the complainant, in order to accommodate the public and transact its business as a common carrier, is required to operate and is now operating over and along said Fourth Street daily, ten regular passenger trains and two regular freight trains, and is moving both intra and interstate commerce over and upon its said railroad tracks, and that the franchise and right to operate said railroad under said Ordinance No. 599, in accordance with the terms thereof, exceeds the jurisdictional amount.

Complainant further alleges that Ordinance No. 16491 is void and of no force and effect, in this:

(a) That thereby the City of Portland would take property of the Southern Pacific Company without just or any compensation, and without the consent of the Southern Pacific Company, all in violation of Section 18, Article I, of the Constitution of the State of Oregon, which provides that, "Private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation; nor, except in

case of the state, without such compensation first assessed and tendered."

(b) Said Ordinance No. 16491 is void and of no force and effect in this: that it violates Section 21, Article I of the Constitution of the State of Oregon, which provides, "No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution: Provided, that laws locating the capital of the state * * * may take effect or not, upon a vote of the electors interested."

(c) Said Ordinance No. 16491 is void and of no force and effect in this: that it violates the Fourteenth Amendment to the Constitution of the United States, which provides among other things as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and said Ordinance is void particularly in this, that its enforcement will deprive the Southern Pacific Company and the Oregon & California Railroad Company of its property, to-wit, its rights under said Ordinance No. 599, and under the said Act of Congress of May 4, 1870, without due process of law, and is a denial to the Southern Pacific Company and the Oregon & California Railroad Company of the equal protection of the laws.

(d) Said Ordinance No. 16491 is void and of no force and effect in this: that it violates Article I, Section 8, paragraph 3, of the Con-

stitution of the United States, which provides, "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 8, of the Constitution of the United States, which provides: "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," and particularly in this, that the enforcement of said ordinance by said City of Portland will interfere with, restrain and prevent the movement of interstate commerce, and is a burden upon said interstate commerce so being carried by said Southern Pacific Company between Corvallis and said northerly terminus of said railroad at the intersection of Fourth Street and North Front Street, and to connection with other carriers doing business at said last named point, and impairs the rights granted by said Act of Congress of May 4th, 1870.

(e) Said Ordinance No. 16491 is void and of no force and effect in this, that it provides for excessive, unusual penalties, fines and punishments, and thereby deprives the Southern Pacific Company and its officers and agents, and other citizens of the United States, of the equal protection of the law, and thereby takes the property of the complainant without due process of law.

(f) Said Ordinance No. 16491 is void and of no force and effect in this; that it violates Section 10, Article I, of the Constitution of the United States, which, among other things, provides, "No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," and that the said

ordinance attempts to and if enforced will impair the obligation of the contract created between the Oregon Central Railroad Company, its successors and assigns, and the said City of Portland, under said Ordinance No. 599, heretofore set out.

(g) The said Ordinance No. 16491 is void and of no force and effect in this, that it is unreasonable, arbitrary, and oppressive, and particularly in this, that although said railroad has been continuously operated over said Fourth Street as aforesaid, with steam locomotives, for thirty-nine years, there has never been any serious accident or injury caused to anyone thereby, and by reason of the physical location of the said City of Portland, and the location of the line of railroad under said Act of Congress of May 4th, 1870, and under the Articles of Incorporation of the Oregon Central Railroad Company, it was and is physically impossible to construct, locate or operate a line of railroad into the City of Portland from the south boundary thereof into the terminals and station of the said Southern Pacific Company, now within the yards of the Northern Pacific Terminal Company, over or upon any other route, line or street other than said Fourth Street where the same has been so continuously operated and maintained.

Upon filing the bill of complaint, the court made an order restraining the defendant and its officers from attempting to enforce the provisions of Ordinance No. 16491, or from attempting to prosecute the complaint described in the bill of complaint, or any other action or proceeding to enforce the ordinance or any penalty for the alleged violation thereof; which order was contained in effect by

the trial court by a decree, until this appeal could be heard and determined, or until otherwise ordered by the court.

The defendant filed its answer on March 31, 1909, admitting the incorporation of complainant, and that the defendant was a municipal corporation, and admitting the jurisdictional averments of the bill of complaint, and that the Oregon Central Railroad Company was a corporation until about the year 1906, and had authority to construct and operate a railroad, and that on January 6, 1869, Ordinance No. 599 was duly approved, and that the copy of the ordinance set out in the bill of complaint is a correct copy thereof, and that the Oregon Central Railroad Company accepted said ordinance.

The answer admits that the Oregon & California Railroad Company is duly incorporated under the laws of the State of Oregon, and also admits that Ordinance No. 16491 is as set out in the bill of complaint; admits the attempted prosecution of the complainant and its General Manager, and the pendency of that proceeding, and admits that the City of Portland was incorporated under the Act of January 23, 1903, and that the same is now in force, and admits the provisions of that Act set out in the complaint; admits that the incorporators of the Oregon Central Railroad Company attempted to effect a dissolution of that company; admits that the complainant operates ten or more passen-

ger trains, and two or more freight trains over said Fourth Street daily.

Further answering the defendant alleges that Ordinance No. 599 went into effect January 6th, 1869, and that at that time the population of the City of Portland was approximately 7,500 persons, and the city was divided by the Willamette River into two parts, commonly known as the East Side and the West Side, and that on the West Side is the principal business district of the city, and a large residence district, furnishing homes for upwards of 75,000 persons; that Fourth Street runs north and south; that between Fourth Street and the Willamette River, and parallel therewith, are Third, Second, First, and Front Streets; westerly from Fourth Street and parallel therewith are many streets numbered consecutively in an ascending scale; that at the time of the passage of Ordinance No. 599, the business district of the city was along Front Street and the Willamette River; that at that time no business houses or commercial enterprises were located on Fourth Street, and there was practically no population upon Fourth Street, or that the population was so situated with reference to it, that the said Fourth Street was not used or occupied for general public travel, and said Fourth Street was not graded, paved, or open or in condition for public travel, and that the entire district adjoining said street and westerly therefrom was substantially without population;

That when Ordinance No. 16491 was passed, May 1, 1907, the population of the City of Portland was upwards of 225,000, and the business district bounded as follows: upon the East by Grand Avenue on the East of the Willamette River, upon the South by Jefferson Street, upon the West by Thirteenth Street, and upon the North by the Willamette River; that the business center of the business district of the city is upon Front, First, Second, Third, Fourth, Fifth and Sixth Streets, between and where they are intersected by Morrison, Alder, Washington, Stark and Oak Streets; that along Fourth Street for many blocks are business houses of many kinds, including hotels, schools, wholesale houses, shops, stores, department stores, County Court House and City Hall, and upon this street are located many of the principal business houses of the City of Portland;

That Fourth Street is also intersected by street car lines running in an easterly and westerly direction along and upon Glisan Street, Burnside Street, Washington Street, and Morrison Street, and said street car lines afford transportation facilities for a majority of the population of the west side and to and from the business section of the west side and the homes of upward of seventy five thousand persons living upon the west side, and during *fifteen or sixteen hours* of each day upon said intersecting streets, upwards of a dozen cars cross said Fourth Street every minute; that Fourth Street is one of

the principal arteries of travel of the City of Portland and constantly *every day* many thousand people in the pursuit of their usual business, and hundreds of teams, and vehicles, engaged in ordinary business, travel upon and across said Fourth Street, and there is *almost continually* a great congestion upon said Fourth Street at its intersection with Glisan, Burnside, Stark, Washington and Morrison Streets;

That there are large water mains, gas mains and other utilities serving the public, crossing and along said Fourth Street in the business center of said city, which are disturbed, broken and partially destroyed by the vibration of the trains on said Fourth Street, to the great injury and damage of the public; that just south and rising from the center of the business district there is a pronounced ascent or grade southerly along said Fourth Street, and at several points along the line of railroad upon said Fourth Street the ascent is about four per cent, or an ascending grade of four feet in every running hundred feet;

That notwithstanding this the complainant has at all times in the past, and now does, run and operate over said railroad tracks upon Fourth Street, heavy trains of freight cars, drawn by large steam locomotives; that the operation of said cars and locomotives constitute and are and for several years last past, and at the time of the enactment of said Ordinance No. 16491, have been a grave and con-

stant menace to the safety, lives and limbs of the people of the City of Portland and the public generally, and a serious and constantly increasing impediment to traffic and is a check upon the growth and development of said city; that the noise, roar, vibration and the emissions of smoke, steam, soot and cinders incidental to the operation of said cars and locomotives, were and are a source of constant danger to property, and a constant and increasing source of danger, discomfort and inconvenience to the lives, health, safety and comfort of the citizens of Portland, and of the public generally; that said Ordinance No. 16491 was enacted by the Council of the City of Portland *under and by virtue of the authority of and pursuant to the reserved powers in said Ordinance No. 599, and in the proper and reasonable exercise of the police powers of the City of Portland for the protection of property and the lives, health, safety and comfort of the citizens thereof, and the public generally.*

To this answer complainant filed its general replication on April 30, 1909, and thereafter much testimony was taken in open court. On April 4, 1910, the court delivered a written opinion, (Pages 27-31 Transcript) as a result of which a decree of dismissal was entered. Complainant then filed its petition for appeal, and therewith an Assignment of Errors, which may be summarized in the following:

SPECIFICATION OF ERRORS

I.

That said Circuit Court erred in deciding that the plaintiff is not entitled to the relief prayed for in its bill of complaint, or to any relief whatever in said cause.

II.

That said Circuit Court erred in dismissing said cause and said bill of complaint.

III.

That said Circuit Court erred in refusing to grant to plaintiff the relief prayed for in its bill of complaint herein.

IV.

That said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, is in contravention of Section 18, Article I, of the Constitution of the State of Oregon, which provides:

"Private property shall not be taken for public use, nor the particular services of any man demanded without just compensation; nor, except in case of the state, without such compensation first assessed and tendered."

V.

That said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, is in contravention of Section 21, Article I, of the Constitution of the State of Oregon, which provides:

"No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, the taking effect of which shall be made to

depend upon any authority, except as provided in this Constitution; Provided, that laws locating the capital of the state * * * may take effect or not, upon a vote of the electors interested."

VI.

That said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, is in contravention of the Fourteenth Amendment to the Constitution of the United States, which provides among other things as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And said ordinance is void particularly in this, that its enforcement will deprive the Southern Pacific Company and the Oregon & California Railroad Company of its property, to-wit, its rights under said Ordinance No. 599, and under the Act of Congress of May 4, 1870, without due process of law, and is a denial to said Southern Pacific Company and said Oregon & California Railroad Company of the equal protection of the laws.

VII.

Said Ordinance No. 16491 passed by the Common Council of the City of Portland on May 1, 1907, violates Article I, Section 8, para-

graph 3, of the Constitution of the United States, which provides:

"The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 8, of the Constitution of the United States, which provides:

"The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," and particularly in this, that the enforcement of said ordinance by said City of Portland will interfere with, restrain and prevent the movement of interstate commerce, and is a burden upon said interstate commerce so being carried by said Southern Pacific Company between Corvallis and said northerly terminus of said railroad at the intersection of Fourth Street and North Front Street, and to connection with other carriers doing business at said last named point, and impairs the rights granted by said Act of Congress of May 4th, 1870.

VIII.

Said Ordinance No. 16491 is void and of no force and effect in this, that it provides for excessive, unusual penalties, fines and punishments, and thereby deprives the Southern Pacific Company and its officers and agents, and other citizens of the United States, of the equal protection of the law, and thereby takes the property of the complainant without due process of law.

IX.

Said Ordinance No. 16491 is void and of no force and effect in this, that it violates Section 10, Article I, of the Constitution of the United States, which among other things provides: "No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," and that the said ordinance attempts to and if enforced will impair the obligation of the contract created between the Oregon Central Railroad Company, its successors and assigns, and the said City of Portland, under said Ordinance No. 599.

X.

The said Ordinance No. 16491 is void and of no force and effect in this, that it is unreasonable, arbitrary, and oppressive, and particularly in this, that although said railroad has been continuously operated over said Fourth Street as aforesaid, with steam locomotives for thirty-nine years, there has never been any serious accident or injury caused to anyone thereby, and by reason of the physical location of the said City of Portland and the location of the line of railroad under said Act of Congress of May 4th, 1870, and under the Articles of Incorporation of the Oregon Central Railroad Company, it was and is physically impossible to construct, locate or operate a line of railroad into the City of Portland from the south boundary thereof, into the terminals and station of the said Southern Pacific Company, now within the yards of the Northern Pacific Terminal Company, over or upon any other route, line or street other than said Fourth Street, where the same has been so continuously operated and maintained.

XI.

Said Ordinance No. 16491 is in violation of subdivision 3 of Section 73 of the Charter of the City of Portland, which provides:

"The Council has power and authority, subject to the provisions, limitations and restrictions in this charter contained * * * to provide for the punishment of a violation of any ordinance of the city by fine or imprisonment not exceeding Five Hundred Dollars, or six months imprisonment, or both, or by forfeiture, as penalty."

The testimony taken shows substantially this state of facts:

That on April 15, 1868, the Oregon Central Railroad Company commenced the construction of its line of railroad from the North end of Fourth Street, along Fourth Street, to the Southerly boundary limits of the city, and continued such construction until it reached a point at or near McMinnville, on the Yamhill River, and that thereafter the Oregon & California Railroad Company extended the road to Corvallis, Oregon, a distance of some 97 miles from Portland; that at the time the road was constructed along Fourth Street the business of the city was to the East thereof, in the main; that the railroad company, after the passage of Ordinance No. 599, January 6, 1869, accepted the terms and provisions of that ordinance, and made the improvements required by that ordinance, and that its successor, the Oregon & California Railroad Company, and the Southern Pacific Company, ever since that date, have continuously complied

with the terms and provisions of that ordinance, and have expended in that behalf approximately the amount of money alleged in the complaint.

That the population of the City of Portland in 1869 was 8928, as shown by the local directories, but that the federal census of 1870 showed a population of 8300; that on January 2, 1869, the buildings along Fourth Street were mainly wooden buildings, sparsely located; that the Court House block had a school and a one-story cottage thereon, and that there was no business on that street; that the buildings on that street were residence buildings, and that it was an earth street; that the amount of travel on Fourth Street at that time was small; the street was almost impassable for hauling.

There was offered in evidence, also, the charter of the City of Portland as it was in 1864, (See Pages 64-88 Transcript). This was introduced to show that the City of Portland at the time of the passage of Ordinance No. 599, had no authority to pass this ordinance excepting pursuant to and under the authority of Sections 24 and 25 of the Act of the legislature of the State of Oregon, of October 14, 1862, being Sections 6841 and 6842 Lord's Oregon Laws, *supra*.

The testimony further tends to show that from the time the road was first begun to be operated, down to the date of trial, there had been but two accidents resulting in death, one at Burnside Street,

and one between Stark and Morrison Streets; one an ex-railroad man who had attempted to board a freight train, and who was under the influence of liquor, missed his footing and fell under the train; the other was a man attempting to board an excursion train while the train was in motion. This man was also under the influence of liquor. That there had been a few accidents where parties driving wagons were thrown out, but in every one of these cases it was by reason of their backing up against the train while the train was in motion, or driving alongside of the train, getting too close. These were none of them serious. There was a collision with a car of the Portland Railway Light & Power Company, investigated by the Railroad Commission, which found that the motorman was careless in operating his car. With the exception of these accidents, and that of a man riding in his wagon, who was thrown out while he was attempting to drive in front of the engine, there has never been any collision of any street car or any wagon or any vehicle of any kind during the time covered by the testimony of the Superintendent of the road, who testified in the case,—a period of twenty-six years.

Superintendent L. R. Fields, who had thus operated the property for twenty-six years, and had been connected with the road for thirty-four years, testified that the trains, both freight and passenger, could be operated with reasonable safety to the

people having occasion to cross the streets, the people having occasion to ride in the cars across the streets, and to footmen and others of the public, with the city having its present population, say 225,000, or even twice as large, or more, or for that matter, in a city with any number of people. (Page 96 Transcript) That no gates or signals have ever been placed at the intersection of any of the cross streets, and no requirements on the part of the city to install electric bells at any of these crossings, to give warning of the approach of any of these trains. That 75% of the business over the road was passenger, and about 25% freight; that the maximum grade on Fourth Street was 3.4%, the steepest part of the grade being just above the City Hall.

The testimony further tended to show, and is, we think, substantially conclusive upon that point,—that there never had been any accident on this street as a result of *the operation of the line*; that the accidents when they did occur, were such as would happen or might happen anywhere, and at any time, and that they were few in number and unimportant in character.

The record shows the dissolution of the Oregon Central Railroad Company under the laws of the state, and the transfer and conveyance of all of its property to the Oregon & California Railroad Company, including the franchise granted by Ordinance No. 599.

The record also shows that the Oregon & California Railroad Company leased its railroad to the complainant, and that it was duly authorized by the laws of the state, and its Articles of Incorporation, to execute the lease.

There is but little conflict in the testimony as to the condition of Fourth Street, the population of the city, and other physical facts as they existed January 6, 1869, and as they exist at the present time. There was and is but little dispute in the evidence as to the fact that no serious accidents resulted from the operation of the line on Fourth Street during the time it has been operated. There was testimony upon behalf of the city tending to show that the noise of the locomotives tended to interfere for a few moments with the transaction of public business in the City Hall. There was no testimony offered on behalf of the city tending to show that the movement of freight traffic, or the operation of trains by locomotives, *at restricted periods at night, would not remove all these objections, and would not remove any possible risk of accident to careless footmen or other persons crossing the tracks.*

A number of ordinances were introduced to show recognition by the City of Portland of the rights of the Oregon & California Railroad Company and Southern Pacific Company, Lessee; that the Oregon & California Railroad Company was the owner of the franchise granted by Ordinance No. 599, and

that Southern Pacific Company, as its lessee, was entitled to exercise and enjoy all the rights granted thereby.

The evidence is overwhelming to the point that the City of Portland has recognized the Oregon & California Railroad Company as the assignee and successor in interest of the Oregon Central Railroad Company, and as such entitled to the rights and privileges granted by this ordinance. This testimony was offered for the purpose of showing that the City of Portland had recognized the assignability of this franchise, notwithstanding no words of express assignment are found in the ordinance.

The controlling questions in this case may be grouped and stated as follows:

POINTS AND AUTHORITIES

I.

The legislature of the State of Oregon, representing the public at large, under the provisions of the Act of October 14, 1862, by Sections 24 and 25 thereof, now Sections 6841 and 6842 of Lord's Oregon Laws, granted to the Oregon Central Railroad Company, its successors and assigns, the right, in furtherance of the public duties cast upon the railroad company, to construct, locate and operate its railroad in and along Fourth Street, subject to the right of the City of Portland, under the authority granted by this statute, to consent to the extent, terms and conditions upon which such right should

be exercised, but if the city did not consent, then such right was to be exercised in any event.

At the time Ordinance No. 599 was passed, evidencing the consent of the City of Portland, upon January 6, 1869, the charter of the City of Portland, then in effect, was the Act of October 14, 1864, pages 64 to 88 Transcript of Record. Under that charter the Legislative Assembly delegated no power or authority to the City of Portland in respect to this matter, and the exclusive authority was vested in the Legislative Assembly, under Sections 6841 and 6842 of Lord's Oregon Laws, which are as follows:

"Section 6841. Public Grounds, Streets, etc., May be Appropriated.

When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street, or alley, or public grounds, the county court of the county wherein such road, street, alley, or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road."

"Section 6842. Streets, etc., in Corporate Towns, Proceedings to appropriate.

Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section, if

the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, or alley, or public grounds, within such town as the local authorities mentioned in the last section and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

The City of Portland had no power or authority under its charter of January 23, 1903, in effect when Ordinance No. 16491 was passed, to amend, modify, or repeal the rights granted under this Act of the Legislative Assembly, and at most could regulate the use of this street, and the exercise of this right, under the police power, provided such regulation did not impair, modify, or repeal the right granted under the statute, and provided that the regulation under the police power was reasonable.

Statutes holding that legislative grants to telephone and telegraph companies, and other public service corporations, under general statutes, cannot be impaired or restricted by ordinances of municipal corporations, are analogous to the case at bar.

Abbott et al. v. City of Duluth, 104 Fed. 833
 Omaha Electric Light & Power Co. v. City
 of Omaha, 179 Fed. 455, 459
 Sunset Telephone & Tel. Co. v. City of Po-
 mona et al., 172 Fed. 829, 832
 City of Columbus et al. v. Union Pac. Ry.,
 137 Fed. 869, 873

- City of Wichita v. Old Colony Trust Co. 132
 Fed. 641, 645
 State ex rel Wis. Met. Tel. Co. v. Milwaukee,
 132 Wis. 615;
 Same case, 1 L. R. A. 581, notes.
 State ex rel Wis. Tel. Co. v. City of Sheboy-
 gan, 111 Wis. 23
 Wisconsin Tel. Co. v. City of Oshkosh, 62
 Wis. 32
 Township of Summit v. N. Y. & N. J. Tel.
 Co., 57 N. J. Eq. 123
 Chamberlain v. Iowa Tel. Co., 119 Ia. 619,
 625
 New Hope Tel. Co. v. City of Concordia,
 106 Pac. 35 (Kan.)
 Missouri R. Tel. Co. v. City of Mitchell, 22
 S. D. 191
 Michigan Tel. Co. v. City of Benton Harbor,
 121 Mich. 512
 Telephone Company v. City of St. Joseph,
 121 Mich. 502, 506
 Village of Jonesville v. Southern Michigan
 Tel. Co., 155 Mich. 86
 Village of Carthage v. Central N. Y. Tel.
 Co., 185 N. Y. 448
 Northwestern Tel. Exchange v. City of Min-
 neapolis, 81 Minn. 140
 Western Union Tel. Co. v. City of Visalia,
 149 Cal. 744
 State v. City of Helena, 34 Mont. 67
 City of Wichita v. Missouri & Kansas Tel.
 Co., 70 Kan. 441
 State ex rel Tel. Co. v. Mayor, 30 Mont. 338,
 341
 3 Dillon on Municipal Corp. 5th Ed. Secs.
 1122, 1128, 1161, 1226, 1227, 1228, 1229,
 1230.

The charter of the City of Portland in effect when Ordinance No. 16491 was passed, being the

Act of the Legislative Assembly of January 23, 1903, did not amend, modify or repeal the state statute contained in Sections 6841 and 6842 Lord's Oregon Laws.

- City of Louisville v. Cumberland Tel. Co.,
224 U. S. 649
- City of Wichita v. Missouri & Kans. Tel. Co.
70 Kan. 441
- State v. City of Helena, 34 Mont. 67
- City of Louisville v. Louisville Water Co.,
105 Ky. 754
- 3 Elliott on Railroads, 2nd Ed. Sec. 1076
- Africa v. Board of Mayor & Aldermen, 70
Fed. 729
- Mayor etc. of Knoxville v. Africa, 77 Fed.
501, 507
- Citizens St. Ry. Co. v. City Ry. Co., 64 Fed.
647
- Southern Bell Tel. Co. v. City of Mobile, 162
Fed. 523, 528
- Dakota Cent. Tel. Co. v. City of Huron, 165
Fed. 226, 230
- 1 Dillon on Municipal Corp. 5th Ed. Secs.
235, 236
- Wright v. Nagel, 101 U. S. 791
- Detroit v. Detroit Citizens Street Ry. Co.,
184 U. S. 368, 395, 397
- Arcata v. Arcata & M. R. R. Co., 92 Cal.
639, 645
- Eichels et al. v. Evansville St. Ry. Co., 78
Ind. 261
- Chicago & R. I. Ry. v. City of Joliet, 79
Ill. 25
- Hudson Tel. Co. v. Jersey City, 49 N. J. L.
303
- State v. Noyes, 47 Me. 189
- McQuaid v. Portland & Vanc. Ry. Co., 18
Or. 237, 248
- Rio Grande RR. Co. v. Brownsville, 45 Tex.
96

II.

The legislature of the State of Oregon, by the Act of October 14, 1862, by Sections 24 and 25 thereof, being Sections 6841 and 6842 of Lord's Oregon Laws, in the exercise of its public policy, and in furtherance of the uses of this street for the transfer of persons and property, created the rights claimed by the Oregon Central Railroad Company, and the City of Portland evidenced its assent by the enactment of Ordinance No. 599. Whether the rights thereby created were granted by the state, or directly by the city, such grant, and the assent of the city evidenced by this ordinance, when accepted by the Oregon Central Railroad Company became a perpetual and irrevocable franchise. As a matter of law, the Common Council has no power to repeal, amend, or modify this ordinance. The rights thereby created constituted a franchise or contract which cannot be altered, impaired or repealed, and these rights, when accepted by the grantee, became a vested property right which could be assigned, conveyed, mortgaged, sold, leased, or otherwise disposed of, in the same manner and for the same purposes as any other property of this kind. Nor can the company, its successors or assigns, or lessee, be divested of its rights thereunder, excepting by alienation, forfeiture, or condemnation, after just compensation therefor.

Des Moines City Ry. Co. v. City of Des
Moines, 151 Fed. 854
City of Rushville v. Rushville Nat. Gas. Co.
164 Ind. 162

Same case, 3 Am. & Eng. Ann. Cases, 86,
note at page 88

Northwestern Tel. Exchange v. City of Min-
neapolis, 81 Minn. 140

Western Union Tel. Co. v. City of Visalia,
149 Cal. 744

People v. Cent. Union Tel. Co., 192 Ill. 307,
311

Chicago Tel. Co. v. Northwestern Tel. Co.,
199 Ill. 324, 346

3 Dillon on Municipal Corp. 5th Ed. Secs.
1210, 1222, 1242

Mayor etc. of Knoxville v. Africa, 77 Fed.
501, 507

Baltimore Tr. & Guarantee Co. v. Mayor,
etc. of City of Baltimore, 64 Fed. 153;
reversed in

Baltimore v. Baltimore Tr. & Guarantee Co.,
166 U. S. 673

In the last named case the court held, under the particular circumstances of that case, that where an ordinance granted the right to locate and operate *two* tracks on a portion of the streets covered by a general ordinance, granting the use of the streets for double tracks for many miles, that the subsequent limitation of *that use to one track* to but a few hundred feet, where peculiar and exceptional conditions existed, and where the danger to be apprehended from the use of electric cars on double tracks in a narrow and busy thoroughfare was very great, and where, *prior to the action of the Council prohibiting the laying of double tracks at this point, the company had not located and laid down both tracks*, the right exercised by the Council

was the exercise of a reasonable *regulation of the use of the street*, in the circumstances.

Citizens St. Ry. v. City Railway Co., 56 Fed. 746, 748

Detroit Citizens St. Ry. Co. v. City of Detroit, 64 Fed. 628

Mercantile Tr. & Deposit Co. v. Collins Park Co., 99 Fed. 812, 816

City Street Ry. Co. v. City Ry. Co., 166 U. S. 557

City of Buffalo v. Chadeayne, 134 N. Y. 163, 165

City of Kansas v. Corrigan, 86 Mo. 67

Springfield R. R. Co. v. City of Springfield, 85 Mo. 674

Railroad Co. v. City of New Orleans, 46 La. Ann. 526

City of Burlington v. Burlington St. Ry. Co., 49 Ia. 144

City of Des Moines v. Chicago, R. I. & P. Ry. Co., 41 Ia. 569

City of Indianapolis v. Consumers Gas. Tr. Co., 140 Ind. 107

Western Paving Supply Co. v. Citizens Street Ry., 128 Ind. 525, 529

Village of London Mills v. White, 208 Ill. 289, 298

Wright v. Milwaukee Electric Ry. & L. Co., 95 Wis. 29

City of New Orleans v. Great Southern Tel. Co., 40 La. Ann. 42

Shreveport Traction Co. v. City of Shreveport, 122 La. 1

Madison v. Alton etc. Trac. Co., 235 Ill. 346, 349

People v. Central Union Tel. Co., 232 Ill. 260

Town of Mason v. Railroad Co., 51 W. Va. 183

Com. Electric Light & Power Co. v. Tacoma,
17 Wash. 661, 672

Vicksburg v. Vicksburg Water Works Co.,
202 U. S. 453

Louisville v. Cumberland Tel. Co., 224 U. S.
649

The power to assign this franchise and property right granted to the Oregon Central Railroad Company arises under Sections 5068, 5070, Bellinger & Cotton's Code, then in effect, under which the legislature authorized the dissolution of the railroad company and the sale of its property. Under subdivision 7, of Section 5056, Lord's Oregon Laws, Southern Pacific Company had authority to acquire by lease the property of the Oregon & California Railroad Company, and, under Sections 6735 and 6736 Lord's Oregon Laws, was granted authority to operate its railroad and to acquire by way of lease, all the rights evidenced by Ordinance No. 599. Under Section 227, Lord's Oregon Laws, this property right was subject to sale on execution, and under the power to mortgage, a foreclosure sale under such mortgage would vest in the purchaser title to the rights evidenced by Ordinance No. 599, and this, too, without words of assignability expressly contained in the ordinance.

Southern Bell Tel. Co. v. City of Mobile,
162 Fed. 523, 532

C. M. & St. Paul Ry. Co. v. Minn. Cent. Ry.
Co., 14 Fed. 525

Coast Line R. R. Co. v. City of Savannah, 30
Fed. 646, 648

Cleveland City Ry. Co. v. City of Cleveland,
94 Fed. 385, 395

- City of St. Louis v. Western Union Tel. Co.,
 63 Fed. 68, 70
 Mercantile Tr. & Deposit Co. v. Collins Park
 Co. 101 Fed. 347, 350
 People v. O'Brien, 111 N. Y. 1
 Columbia Ave. Savings etc. Co., v. City of
 Dawson, 130 Fed. 152
 Mercantile Tr. & Deposit Co. v. Columbus
 Water Works Co., 130 Fed. 180
 Farmers' Loan & Tr. Co. v. Meridian, 139
 Fed. 661, 665, 669
 New Orleans Gas Co. v. Louisiana Light Co.
 115 U. S. 650, 660
 New Orleans Water Works Co. v. Rivers,
 115 U. S. 674
 Detroit v. Detroit Citizens St. Ry. Co., 184
 U. S. 368, 395, 397
 Hot Springs Elect. Light Co. v. Hot Springs,
 70 Ark. 300
 Workman v. Southern Pacific Co., 129 Cal.
 536, 543
 Chicago Municipal Gas L. Co. v. Town of
 Lake, 130 Ill. 42, 53, 54
 Belleville v. Citizens Horse Ry. Co., 152 Ill.
 171, 185
 Hovelman v. Kansas City Horse Ry. Co.,
 79 Mo. 632, 643
 Cleveland v. Cleveland Elect. Ry. Co., 201
 U. S. 529
 Los Angeles v. Los Angeles City Water Co.,
 177 U. S. 558
 New Orleans etc. R. R. Co. v. Delamore, 114
 U. S. 501, 507
 Chicago v. Sheldon, 9 Wall. 50, 55
 Harvey v. Aurora & Geneva Ry. Co., 186
 Ill. 283, 293
 West Chicago v. City of Chicago, 178 Ill. 339
 People v. West Division Ry. Co., 118 Ill.
 113, 118
 Hudson Tel. Co. v. Jersey City, 49 N. J. L.
 303

- Belleville v. St. Clair Turnpike Co., 234 Ill.
428
Vicksburg Water Works Co. v. Vicksburg,
185 U. S. 65
Minneapolis v. Minneapolis St. Ry. Co., 215
U. S. 417
Greenwood v. Freight Co., 105 U. S. 13, 20
Asheville St. Ry. Co. v. City of Asheville,
109 N. C. 688
H. J. & C. Traction Co. v. H. & L. E. Trac.
Co., 69 Ohio St. 402, 410
Mayor etc. v. Houston Street Ry. Co., 83
Tex. 548

III.

It was not within the police powers of the City of Portland to enact a valid ordinance containing the terms and provisions of Ordinance No. 16491. Such ordinance was not a reasonable exercise of the police power of the city, or of the state. The Council cannot, under the police power, by mere legislative fiat, declare an act to be a nuisance, or assume it to be a nuisance, and abate a lawful act, without judicial review, or opportunity for judicial review, on questions of fact. The use and operation of steam locomotives is not per se a nuisance, nor an injury to the public; nor can it be shown to be an injury in any sense, to the public. Mere private injury, if any exists, is not the subject of legislation under the police power, or under the power to abate a nuisance.

- 3 Dillon on Municipal Corp. Secs. 1269, 1270
3 McQuillan on Municipal Corp. Secs. 953-5
C. M. & St. P. Ry. v. Minn. Cent. Ry. Co., 14
Fed. 525

Port of Mobile v. Louisville & N. Ry Co., 84
Ala. 115-122

Grossman v. City of Oakland, 30 Or. 478

Same case, 36 L. R. A. 593, note.

Belleville v. Turnpike Co., 234 Ill. 428

Ex parte Wygant, 39 Or. 429, 432

2 Elliott on Roads & Streets, Sec. 1054, 3rd
Ed.

1 Elliott on Roads & Streets, Secs. 549, 550,
3rd Ed.

IV.

The City of Portland has ratified the assignment of this franchise, and the rights of complainant thereunder, and is estopped from claiming that such franchise was not assignable, and that complainant has no rights thereunder. Furthermore, by Section 106 of the Act of January 23, 1903, now in effect, the City of Portland ratified and confirmed Ordinance No. 599, and recognized and ratified its continuance in force and effect, as originally granted.

Port of Mobile v. Louisville & N. Ry. Co., 84
Ala. 115, 122

Chicago, R. I. & P. Ry. Co. v. City of Joliet,
79 Ill. 25, 40

Com. Electric L. & P. Co. v. Tacoma, 17
Wash. 661, 672

Carter v. Meuli, 122 Cal. 367

State v. Water Co., 61 Kan. 547

Louisville v. Cumberland Tel. Co., 224 U. S.
649

Vicksburg v. Vicksburg Water Works Co.,
202 U. S. 453

V.

The franchise evidenced by Ordinance No. 599 was one in perpetuity, and the legislature, under Sections 6841 and 6842, Lord's Oregon Laws, had full power and authority to grant a perpetual franchise.

3 Dillon on Municipal Corp. Secs. 1265-1268

A franchise in perpetuity, when authorized by the legislature, may be granted by a municipality.

Des Moines City Ry. Co. v. City of Des Moines, 151 Fed. 855

Louisville Tr. Co. v. City of Cincinnati, 76 Fed. 296, 315

3 Dillon on Municipal Corp. 5th Ed. Secs. 1266, 1267, 1268

Citizens St. Ry. Co. v. City Ry Co., 64 Fed. 647

City Ry. Co. v. Citizens Ry. Co., 166 U. S. 557, 566

Detroit Citizens St. Ry Co. v. City of Detroit, 64 Fed. 628

Capdevielle v. New Orleans & S. F. R. Co., 110 La. 903

Wyandotte Elect. L. Co. v. City of Wyandotte, 124 Mich. 43

Campbellsville Tel. Co. v. Lebanon L. & L. Tel Co., 118 Ky. 277

Venner v. Chicago City Ry Co., 236 Ill. 349

Snell v. City of Chicago, 133 Ill. 413

Blair v. Chicago, 201 U. S. 400

City of Seattle v. Col. & P. S. R. Co., 6 Wash. 379

City v. Telephone Co., 40 La. Ann. 42

Louisville v. Cumberland Tel. Co., 224 U. S. 649

Village of Phoenix v. Gannon, 108 N. Y. Supp. 255

In re Con. Gas. Co. of New York, 106
N. Y. Supp. 407
People v. O'Brien, 111 N. Y. 1, 38

VI.

This railroad line on Fourth Street, from North Front Street, or from connection of Front Street with the yards of the Northern Pacific Terminal Company, is a part of the road designated and required to be built under the Act of Congress of May 4, 1870, and is there pursuant to this Act, and cannot be abandoned by the company, or its successors, even if they desired so to do. The City of Portland cannot deprive the company of the use of this portion of its line for any railway purposes contemplated by the Act of Congress of May 4, 1870, including the use of steam locomotives and freight trains. Such use and operation pursuant to this Act of Congress, is subject only to reasonable regulation under the police power of the state or city, which do not amount to prohibition of the substantial use of such instrumentalities.

Pensacola Tel. Co. v. Western Union Tel.
Co., 96 U. S. 1
3 Dillon on Municipal Corp. 5th Ed. Secs.
1269, 1270

VII.

Even if it be conceded that the city could, under the police power, prohibit the use of steam locomotives on Fourth Street, it could not, as it attempted to do under Ordinance No. 16491, deprive

the company of its right, under reasonable regulations, to move its freight trains at some time during the twenty-four hours. Such a prohibition is a taking of the property of complainant, under the guise of the exercise of the police power; it is not regulation, it is confiscation.

- State ex rel. Wis. Tel. Co. v. City of Sheboygan, 111 Wis. 23, 36
 State ex rel. Wis. Tel. Co. v. City of Oshkosh, 62 Wis. 32, 40
 American Union Tel. Co. v. Harrison, 31 N. J. Eq. 627
 Township of Summit v. N. Y. & N. J. Tel. Co., 57 N. J. Eq. 123, 127
 New Hope Tel. Co. v. City of Concordia, 106 Pac. 35 (Kan.)
 Missouri R. Tel. Co. v. City of Mitchell, 22 S. D. 191
 Michigan Tel. Co. v. City of Benton Harbor, 121 Mich. 512
 Telephone Co. v. City of St. Joseph, 121 Mich. 502, 506
 Village of Jonesville v. Southern Michigan Tel. Co., 155 Mich. 86
 Village of Carthage v. Cent. N. Y. Tel. Co., 185 N. Y. 448
 Northwestern Tel. Exchange v. City of Minneapolis, 81 Minn. 140
 3 Dillon on Municipal Corp. 5th Ed. Secs. 1230, 1269, 1270
 Asheville St. Ry. Co. v. City of Asheville, 109 N. C. 688
 Shreveport Traction Co. v. City of Shreveport, 122 La. 1

VIII.

If Ordinance No. 16491 be invalid in respect to the prohibition against the movement of freight

traffic, then the entire ordinance is void. It is a fundamental rule that if part of an ordinance is void, another essential and connected part of the same is also void. Where an ordinance or statute is couched in terms so broad as to exceed the limitation of the powers of the Council or legislature to enact the same, the court will not, by construction, limit the statute to the scope which might constitutionally be given it by the Council or legislature, but will hold the ordinance or statute unconstitutional and void.

State v. Mayor of Hoboken, 38 N. J. L. 110
United States v. Ju Toy, 198 U. S. 253, 262
Illinois Cent. R. Co. v. McKendree, 203 U. S. 514, 529

IX.

A court of equity has power to protect private property, and to enjoin a continuing injury to property or business, and where a criminal prosecution is threatened or invoked, to prevent the exercise of civil rights conferred by law, injunction is the proper remedy to prevent injury to the property or business thus menaced.

City of Cleveland v. Cleveland City Ry. Co.,
 194 U. S. 517
City of Bessemer v. Bessemer City Water Works Co., 152 Ala. 391, 402
Millville Gas. L. Co. v. Vineland L. & P. Co.,
 72 N. J. Eq. 305
Vicksburg Water Works Co. v. Vicksburg,
 185 U. S. 65
Springfield Ry. Co. v. City of Springfield,
 85 Mo. 674

- Georgia R. R. & B. Co. v. City of Atlanta,
118 Ga. 486
- Railroad Co. v. Town of Triadelphia, 58
W. Va. 487, 505
- Vicksburg v. Vicksburg Water Works Co.,
202 U. S. 453
- State v. Railway Co., 135 Iowa, 694, 705
- Govin v. City of Chicago, 132 Fed. 848, 855
- S. R. & T. Co. v. Mayor, etc., 128 N. Y.
510, 520
- Southern Bell T. & T. Co. v. City of Mobile,
162 Fed. 523, 562
- Des Moines City Ry. Co. v. City of Des
Moines, 151 Fed. 854
- Detroit v. Detroit Citizens' St. Ry. Co., 184
U. S. 368, 381

X.

Ordinance No. 16491 is void in that

- (a) It impairs a vested property right of the complainant,
- (b) It deprives complainant of its property without due process of law; and
- (c) It denies complainant equal protection of the laws.

Cooley, Const. Lim. pp. 556-575

State ex rel Harris v. Herrmann, 75 Mo.
353-4

This ordinance is arbitrary, unreasonable and unequal in its operation. The City Council apparently attempted to make this ordinance general in its operation by inserting in sections 1 and 2 thereof the words "*or any other person, firm or corporation.*" But in view of the fact that at the time of the passage of this ordinance complainant was then running and operating steam locomotives

and freight cars over, upon and along Fourth Street between termini theretofore fixed and designated, and pursuant to a vested right acquired under Ordinance No. 599, and in view of the further fact that no "other person, firm or corporation" at said time, or ever, ran or operated steam locomotives and freight cars over, upon or along said street, makes it manifest and clear that this Ordinance No. 16491 was intended to be and was drawn with special reference to and was directly aimed at the rights acquired by and vested in complainant under said Ordinance No. 599. The said Ordinance No. 16491 therefore not only impairs the obligations of a contract and a vested right of complainant thereunder, but it also contravenes the provisions of the Federal Constiution in that it denies to complainant equal protection of the laws. The case at bar is easily distinguishable from the case of *Railroad Company v. Richmond*, 96 U. S. 521, relied on by counsel for the city.

In that case the Railroad Company was granted the right to construct a railroad "*from some point within the corporation of Richmond*, to be approved by the Common Council". No definite point within the city of Richmond was fixed. That was left to the discretion of the Railroad Company, subject only to the approval of the city. The grant, in that case, was satisfied when the road was built within the city for *any* distance, by *any* route or to *any* point. The Railroad, however, in that case, desired

to pass through Broad Street and for the present to terminate the road upon the lots purchased for shops and warehouses, and requested the city of Richmond to approve that location. This the city of Richmond did, with the following reservation:

"Provided that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad, and connecting the same with the depot of said company within the limits of the city."

This approval, with said reserved power, was accepted by the Railroad Company. In the language of Chief Justice Waite: "The Company therefore occupied Broad Street upon the same terms and conditions it would if the charter had located the route of the road within the city, but, in terms, *subjected the company to the government of the city in respect to the use of the road when constructed.*"

The facts in the case at bar are entirely different. Here the legislature of the State of Oregon, by the terms of the Act of October 14, 1862 (sections 6841 and 6842 of Lord's Oregon Laws) granted to the Oregon Central Railroad Company the right to locate its railroad "*upon such particular road, street, or alley or public grounds within*" the city of Portland, as the local authorities of said city should designate; and in the event the local

authorities of Portland should fail or refuse to make such designation within a reasonable time, when requested, the said Oregon Central Railroad Company had the right to make such *appropriation* without reference thereto

It will be seen that the City of Portland, under the provisions of this Act of October 14th, 1862, had the right in the first instance to *designate* that *particular* street over which the Oregon Central Railroad Company should locate its railroad—but that the railroad company had the *absolute* right to locate its road over *some* street within the city, whether or not the city made any designation. In the case of the *Railroad Company v. Richmond*, 96 U. S. 521, the grant to the railroad company to build its railroad “from some point within the corporation of Richmond” was conditional. It was subject to the approval of the Common Council of Richmond. Again, in that case the Common Council approved the route proposed by the Railroad Company, with the proviso that such approval should not be considered as “parting with *any power or chartered privilege* not necessary to the railroad company for constructing the said railroad, and connecting the same with the depot of said company within the limits of the city.” In this approval the city of Richmond reserved the right to exercise governmental and legislative powers over the road of the railroad company when constructed. The Railroad Company accepted these terms from the city.

Here the Common Council of the City of Portland, under the authority given it by the Act of October 14th, 1862, designated by said Ordinance No. 599, the "center of Fourth Street from the south boundary line of the City of Portland to the north side of "G" Street, and as much farther north as said Fourth Street may extend or be extended," as the particular place and street where the Oregon Central Railroad Company should locate its railroad. The reserved powers in Ordinance No. 599 are not general legislative powers, as was reserved by the Common Council of the City of Richmond, but the powers reserved by this ordinance are limited to specific purposes and within specific bounds, namely:

- (a) To make or to alter regulations for the conduct of said road within the limits of the city.
- (b) To make or to alter regulations for speed of railway cars and locomotives within said limits.
- (c) To restrict or prohibit the running of locomotives *at such time and in such manner* as they may deem necessary.

Under the canons of statutory construction, where the powers reserved are specifically mentioned, such reserved powers will be deemed exclusive of all others. Certainly the power to restrict or prohibit the running of locomotives at certain hours of the day could not be construed to give the power to prohibit the running of the same absolutely and at all times. The power to restrict or prohibit the

running of locomotives "*at such time and in such manner*" as the city council may deem necessary, is a limitation upon the power of the council to prohibit the running of locomotives *absolutely and at all times*.

If Ordinance No. 599 should be given the construction contended for by counsel for the city, it would be necessary to emasculate it and omit therefrom the words "*at such time and in such manner as they may deem necessary*" and interpolate instead the words "*at any time*" or words of similar import or meaning. Certainly the powers reserved in section 3 of Ordinance No. 599 cannot, either by the language used, or by the wildest flights of imagination, be held to give the City power to prohibit the running of freight cars as is attempted to be done in said Ordinance No. 16491. Furthermore, the council had no authority under Ordinance No. 599, or by any ordinance, to make the reservations which have been made. The only power which the Common Council of the City of Portland had on January 6, 1869, when Ordinance No. 599 was passed, was to designate the streets to be appropriated by the Oregon Central Railroad Company, and if the Council refused to designate the street, the legislature authorized the company to appropriate such street as the company might select. It was a grant direct from the state, and the attempt of the Common Council to reserve legislative power by Ordinance No. 599, is void as being unauthorized,

and as attempting to exercise legislative authority which had been exercised by the legislature under the Act of October 14th, 1862, as evidenced by Sections 6841 and 6842 Lord's Oregon Laws. The most that could be said would be that the ordinance having been passed in this form, and accepted by the Oregon Central Railroad Company, operated as a contract, *but such contract could not confer upon the Common Council legislative power which it did not have.*

XI.

When the *manner* of enforcing municipal regulations is prescribed by law, such method is exclusive.

Section 5 of Ordinance No. 599 prescribes the manner of enforcing the same, and the remedy of the city for a violation thereof. The method or procedure there prescribed is exclusive. The City Council of Portland has never passed any ordinance declaring a forfeiture of this franchise, even if it could do so, which is doubtful. But instead said Ordinance No. 16491, a penal ordinance, the effect of which is to divest complainant of a property right, was passed.

Our contention is that complainant cannot be divested of its property rights under Ordinance No. 599, except for abuse or usurpation of such rights, or misuser, abandonment, or failure or refusal to comply with the terms thereof, and then

only in an action in the name of the state, or in the name of the state on the relation of the city. The state granted the franchise, and the state only can divest complainant thereof. *The state did not authorize any forfeiture to be declared. The grant by the state was absolute and unconditional.*

State v. Railway Co. 135 Iowa, 694

Alabama R. R. Co. v. State, 155 Ala. 491

Village of Phoenix v. Cannon, 108 N. Y. 255

XII.

Ordinance No. 16491 is *ex post facto* in that it imposes an additional penalty to that prescribed in Ordinance No. 599.

Meffert v. State Board, 66 Kan. 710

Burgess v. Salmon, 97 U. S. 381

Sheperd v. People, 25 N. Y. 406

Calder v. Bull, 3 Dall. 386

Smith v. Cockrill, 6 Wall. 756

XIII.

Ordinance No. 16491 is void in that it alters the existing remedy under Ordinance No. 599 to such an extent as to materially affect the rights of complainant vested under said Ordinance No. 599. The existing remedy under Ordinance No. 599 for the enforcement of the contract thereunder, is a part of the contract and such remedy cannot be so altered or changed as to impair the contract.

White v. Hart, 13 Wall. 646

Gunn v. Barry, 15 Wall. 610

Bronson v. Kinzie, 1 How. 311

Barnitz v. Beverly, 163 U. S. 118

Pen. L. & C. Works v. Union Oil Co., 100 Wis. 488

Where the charter of a municipal corporation prescribes the *manner* in which its ordinances are to be enforced, the manner so prescribed is exclusive, and they cannot be enforced in any other *manner*.

Cooley, Const. Lim. pp. 265-6, 270, 278, 473
Dillon on Mun. Corp. 3rd Ed. Secs. 336, 339, 410

McQuillan on Mun. Ordinances, Sec. 169
Douglass v. Mayor of Placerville, 18 Cal. 644
Town of Petersburg v. Petzker, 21 Ill. 204
Belleville v. Citizens Horse Ry. Co. 152 Ill. 171

Commonwealth v. Wilkins, 121 Mass. 356
Weeks v. Forman, City Treas., 16 N. J. L. 237

White v. Tallman, 26 N. J. L. 67
State v. Ziegler, 32 N. J. L. 262
Lelan v. Commissioners, 42 N. J. L. 375
Staates v. Borough of Wash., 44 N. J. L. 605
Landis v. Vineland, 54 N. J. L. 75
Hart v. Mayor, p. 588, 589, 9 Wend.
Coonley v. City of Albany, 132 N. Y. 145
Railway v. Asheville, 109 N. C. 690
Mays v. Cincinnati, 1 Ohio St. 268
City of Corvallis v. Carlile, 10 Or. 139
City of Portland v. Schmidt, 13 Or. 17
Walsh v. City of Union, 13 Or. 589
Beers v. Dalles City, 16 Or. 334
Barter v. Comm. 3 P. W. (Penn.) 253
State ex rel Heise v. Columbia, 6 Rich. (S. C.) 404

Blanchard v. City of Bristol, 100 Va. 469
Wheeling etc. R. R. Co. v. Triadelphia, 4 L. R. A. n. s. 321

Where the charter of a municipal corporation prescribes that *certain* penalties may be imposed for a violation of any ordinance, such penalties are ex-

clusive, and an ordinance prescribing a different or greater penalty is void.

Angell & Ames on Corp. Sec. 360

Cooley, Const. Lim. p. 473

Dillons Mun. Corp. Secs. 336, 337, 339, 410

McQuillan on Ordinances, Sec. 169

Ex parte Lange, 85 U. S. 163

Town of Petersburg v. Metzker, 21 Ill. 206

Com. v. Wilkins, 121 Mass. 356

Leland v. Commissioners, 42 N. J. L. 375

Staates v. Borough of Washington, 44 N. J. L. 605

Landis v. Vineland, 54 N. J. L. 75

Mayor v. Ordeman, 12 John. 122

State ex rel Heis v. Columbia, 6 Rich. (S. C.) 404

Section 73 of Article IV of the Charter of the City of Portland, approved January 23, 1903, and in force at the time of the passage of this Ordinance No. 16491, provides:

"The council has power and authority, subject to the provisions, limitations, and restrictions in this charter contained,—

"To provide for the punishment of a violation of any ordinance of the city by fine or imprisonment, *not exceeding \$500 fine or six months' imprisonment, or both, or by forfeiture as penalty.*"

Ordinance No. 16491 makes the following provision for the punishment of a violation thereof, to-wit:

"Sec. 2. Any violation of the provisions of this ordinance by the owners, officers, agents, or employes, of said Oregon Central Railroad Company, or its successors, assigns, or lessees, or any other person, firm or corporation, by so

running or operating steam locomotives or freight cars (other than those excepted in section 1 hereof) or attempting to run or operate the same on said Fourth Street after the time mentioned in section 1 of this ordinance, shall be punishable *by a fine of not less than \$250.00, nor more than \$500.00, or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotives or freight cars, shall constitute a separate offense, and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.*"

It will be observed that the Charter of the City of Portland prescribes the manner in which ordinances are to be enforced. That is to say, it provides for a punishment for a violation of any ordinance by a fine of *not exceeding \$500 or six months imprisonment, or both, or by forfeiture as penalty*; whereas Ordinance No. 16491 imposes a penalty for a violation thereof and punishes a violation thereof by a fine of *not less than \$250 nor more than \$500, or by imprisonment for not more than six months, or by both such fine and imprisonment*; and also provides that each day's running or operating or attempting to run or operate steam locomotives or freight cars should constitute a separate offense; *and also imposes the further penalty of a forfeiture of any and all rights and privileges claimed by the said Oregon Central Railroad Company in respect to the operation of said railway on said street.*

Q. When was the building at Couch and Fourth Streets known as the Overland Hotel built?

A. That was built more than twenty-two years ago.

Q. An old building?

A. Yes sir.

Q. When was the building occupied by the Pacific Paper Company at Fourth and Ankeny built?

A. 1909.

Q. What story—two story building?

A. That is—

Q. Seven?

A. Seven stories.

Q. When was the Blake-McFall construction commenced?

A. In April of this year. It is about eighty per cent completed and is about six stories high.

Q. When was the building occupied by Marshall-Wells Hardware Company built?

A. About five or six years ago.

Q. When was the Weinhardt Building built?

A. That was built five years ago.

Q. When was the Lewis Building commenced?

A. That is under construction and just about finished.

Q. What is that building?

A. That is a nine-story—nine story concrete.

Q. What is it to be?

A. Office building.

Q. And its estimated cost?

694 A. About four hundred and fifty thousand.

Q. What did the Board of Trade Building cost, estimated?

A. I am not familiar with that, but about three hundred and fifty thousand.

Q. When was the Chamber of Commerce Building built, Fourth and Stark, between Third and Fourth?

A. About 1890 I think.

Q. Who owns that now?

A. Why, a Seattle Dock Company at Seattle.

Q. When did they buy it?

A. They bought it about two years ago, from Ladd & Tilton's Bank and the New York Life Insurance Co.

Q. What did they pay for it?

A. I understand six hundred thousand.

Q. What was paid for the 50 x 100 owned by Rufus Mallory between Third and Fourth, facing on Stark?

A. I am not familiar.

Q. Was that the Stearns property?

A. Yes.

Q. Hundred and twenty-five thousand.

A. Something like that, I am not sure.

Q. What is it worth now.

A. About two hundred and fifty thousand.

Q. Isn't it true that it is now under lease to a builder who is paying a ground rent under a twenty-five years' lease of about fifteen hundred dollars a month?

A. Yes sir.

Q. And to build a ten or eleven story building and leave it on the ground?

A. The lease was supposed to have been sold two weeks ago to Mr. Bushong, but he has let it go—has changed his mind.

695 Q. Is the lease in effect or abandoned?

A. No, the lease is in effect—a man by the name of Stickney and some other man got the lease from Mr. Mallory, and trying to turn it over.

Q. What is the term?

A. I understand fifteen hundred per month for twenty-five years and about three years have run.

Q. And they have paid rent during that time?

A. Yes sir.

Q. And that is net to the owner?

A. Yes sir.

Q. Fourth and Washington, occupied by Woodard, Clarke & Co. They are the leading retail druggists of the city?

A. Yes sir.

Q. The largest retail drug firm of the northwest?

A. Yes sir.

Q. They have been there how long?

A. About twelve years or more.

Q. What would you say as to Fourth and Washington being one of, if not the best, retail corner in the entire city of Portland at the present time?

A. Fourth and Washington and Fourth and Morrison are about the best locations in the city at this present time.

Q. There is some progress being made toward making of the four corners at Fifth and Washington and Sixth and Washington, or on Sixth Street, Morrison and Alder and Washington, as something equal to Fourth and Washington and Fourth and Morrison in the retail character, value and capacity.

A. Yes.

Q. The growth of the city is West?

A. Yes.

Q. Retail values growing west?

A. Yea.

Recess taken to 2 P. M. Friday, December 3, 1909.

696 J. N. WHEELER, a witness called on behalf of the defense, being first duly sworn, testified as follows.

Direct examination.

Questions by Mr. BENBOW:

— Mr. Wheeler, where do you reside?

A. Street and number? I live on East Ninth—1335 East Ninth Street North.

Q. How long have you lived in the city of Portland?

A. I came to Portland May, 1876.

Q. What was your business in the early days when you were in the city?

A. I was in the employ of the railroad company here for a part of '79 almost continuously until '94—the summer or '94.

Q. You have noted the size and construction of their engines at that date?

A. To a certain extent, yes sir.

Q. And you operated their engines in the city?

A. Yes sir.

Q. Ever operate an engine up and down Fourth Street?

A. Never did. I never ran an engine up Fourth.

Q. But you have been up and down Fourth Street?

A. Yes sir.

Q. What was the weight of their locomotives at that time?

A. They would range I would judge, from thirty-five to forty-five tons, something like that.

Q. You are familiar with the locomotives now in operation over Fourth Street?

A. Well, I know there is some larger locomotives.

Q. About how many tons are they now?

697 A. Well, this is only an estimate. I have never seen any of them weighed, but I should think sixty-five to seventy tons—the engines running on Fourth Street now.

Q. You are familiar with the action of an engine on a steep grade?

A. Yes sir, I am.

Q. Describe to the Court please, what is the effect as to vibration, etc. of climbing a grade by a steam engine.

A. Well, the larger the locomotive and the greater the grade the heavier they work, the more steam they consume and the greater the noise of the exhaust which causes vibration. A very small engine does not use as much steam as a larger. The larger the engine the greater the noise of the exhaust and the vibration caused by the displacing of the air from the exhaust.

Q. The vibration is greater in proportion to the weight of the engine?

A. Yes sir.

No Cross Examination.

Witness excused.

698 E. J. WENTZ, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— What is your name and business?

A. E. J. Wentz. Manager of Silverfield Company Fourth and Morrison.

Q. How long have you been manager for the Silverfield Co.?

A. Well, this last time I have been with them—only been with them two months—four or five years ago I was with them two years.

Q. Where is Silverfield Company's place located?

A. Corner Fourth and Morrison.

Q. Which corner?

A. Northwest corner.

Q. And what is the character of the business?

A. Ladies' cloaks and suits and furs, millinery, etc.

Q. How much space is occupied by the business?

A. 60 feet by 74 feet I should judge—60 feet by 74.

Q. How many floors?

A. Three floors.

Q. The whole building there?

A. The whole building, yes, the whole part of that building.

Mr. FENTON: What?

A. The part of that building on the east side of that building.

Mr. KAVANAUGH: But clear from the top to the bottom?

A. Clear from the top to the bottom, yes sir, basement also.

Q. The Fourth street line runs on Fourth Street adjoining your building?

A. Yes sir.

Q. What effect has that on your business?

699 A. Well, there is different ways its effect on us. The meanest and the worst way is the steam, dust, soot, and smoke enter into our windows when our windows are open in the summer; and when we have to have them open to get fresh air for our salesladies, soot, dust and smoke and cinders come in the window and spoil the merchandise—the carpets on the floor, expensive carpets—then the merchandise cannot be kept clean.

Q. Do you carry an expensive line of wear?

A. Yes sir.

Q. Suits and furs?

A. Especially in cloaks, suits—furs also. Of course we have furs running all the way from five to a thousand dollars per garment.

Q. What effect has the noise?

A. The noise on the first floor—if anyone on the first floor is talking to a customer, just about the time this train comes along, he cannot understand a word—simply have to stop doing business until the trains have passed.

Q. What effect does it have upon the use of the telephone?

A. Cannot hear a word—simply not one word of telephoning.

Q. Has it any effect on your electric or gas bill?

A. Very true it has. Every time a train goes by of course the lamps shake. We simply stop business entirely until the train is by—of all nature.

Q. Well, how often do they go by?

A. Oh, I should judge—at the present time of course it is more than it has been—I should judge at the present time we get about six trains during business hours.

Q. About six trains?

A. During business hours.

700 Q. When do your business hours begin?

A. Eight o'clock in the morning until six in the evening, Saturday until nine thirty.

Q. Do the bells ring too?

A. Oh, yes, very annoying the noise.

Q. Escaping steam is one of the large matters?

A. Yes, the escaping of steam.

Mr. FENTON: A little bit leading.

Mr. KAVANAUGH: What have you to say concerning the vibration, the shaking?

A. We have for instance—if our window—the trimmer goes into our window and puts a good window as the other windows are in the other part of the city, it would be all to pieces the next morning.

Q. Shaken out?

A. It would be shaken out.

Mr. FENTON: What?

A. The fixtures and different wares we put in the window. Of course if the window trimmer—you will understand if we took three umbrellas and stood in a stationary window, we just take the umbrellas and set together. We don't have to tie them up and in our window you have to tie them down so when the train comes along they won't be disturbed.

Q. How about the draping of dress goods, etc., in windows?

A. We have no dress goods. The only thing we have is—

Q. All made up?

A. Yes sir.

Q. Your forms, do you—

A. Quite often we have to pin them up—well, most of the time. We do pin everything up because we know they will fall down if we don't pin them.

Q. There are some other car lines passing your place—
701 some electric car lines?

A. Yes sir, on Morrison Street.

Q. Do they cause as much vibration as the other?

A. Oh, no.

Q. They cause you no apparent damage by shaking?

A. Oh, no.

Q. Or noise?

A. No.

Cross-examination.

Questions by Mr. FENTON:

— Mr. Wentz, I want to ask you a few questions. You have been with Silverfields—what is the name of the company?

A. The Silverfield Company.

Q. That is owned by Mrs. Silverfield?

A. By Mr. Silverfield and Company.

Q. But Mrs. Silverfield was in charge as manager for a long time, wasn't she?

A. Well, she is there every afternoon.

Q. Yes, she has been foreman to a certain extent.

A. To a certain extent, yes.

Q. She handles furs?

A. No, Mr. Silverfield himself handles the fur department. Mrs. Silverfield has charge of the millinery.

Q. Well, the company then handles furs extensively?

A. Yes sir.

Q. Consisting of ladies' furs, neck dresses and muffs and collars—

A. Coats.

Q. —coats and things of that kind.

A. Jackets, and so on, etc.

Q. You also handle millinery?

A. Yes sir.

702 Q. Silk waists and things of that kind?

A. Yes, sir.

Q. Are your goods kept on shelves or in—how are they kept?

A. The furs, the most expensive furs we handle are kept under cover, but the cheaper furs and long furs which we cannot put under cover are hung on circular racks, as you have seen them in stores.

Q. And your furs, your cheaper furs, are exhibited in show windows on the Morrison Street side?

A. Yes, quite often.

Q. Very large stock of furs in the big window on Morrison street?

A. Well, we change them once in a while. I use the Fourth street window once in a while and use the Morrison street. I change the windows.

Q. These furs hang on forms, don't they?

A. Yes, sir—well, stands.

Q. Stands. Those furs don't fall down, do they, with the jar of the trains?

A. Not on Morrison street.

Q. I know. Ever have any furs fall down by reason of the vibration of the train on the Fourth street side?

A. Fourth street side, yes, sir.

Q. The frame turn over?

A. Quite often we lay or put on the floor in the windows small pieces of fur—cover the whole floor.

Q. I know—just lay it down.

A. Just lay it down, yes, sir. We take one of our stands and set these stands in there. Now, if this stand is not perfectly level—perfectly level, the train comes along and the whole tips over.

703 Q. In other words, you fill the window with furs right on the hard floor.

A. Small pieces.

Q. The hard floor of the show window. Then you put one of these little, frail stands that carry a small fur?

A. Yes, sir.

Q. With a six inch bottom, round?

A. Yes, sir.

Q. Setting up there about three feet high?

A. Yes, sir.

Q. You put a fur on a rack of that character and it will tip over, or lose its balance, by the jar?

A. Yes, sir.

Q. Now, that form stands on about a six inch circular pedestal, about three and a half to four feet high—has cross-arms?

A. Cross-arms.

Q. If the fur is not balanced exactly on the cross-arm it will fall over of its own weight?

A. It would not fall over of its own weight, if nobody touched it or jarred it.

Q. But the slightest movement would upset it, if not exactly balanced to the ounce on the pedestal?

A. It would, yes, sir.

Q. Now, then, the windows which you say you cannot keep your draping on—what draping do you have on Fourth street?

A. I didn't mean draperies at all.

Q. What is it?

A. It is, for instance, little neck pieces—fine neck pieces which we carry—cost all the way from twenty-five cents to five or
704 six dollars.

Q. That is lace pieces.

A. Yes. If you take one of these little lace pieces——

Q. Hand made?

A. Hand made lace, Swiss goods. Take one little lace collar, set it on a little light glass stand, and I have a great many broken—one glass stand was broken this morning.

Q. You don't know what caused it?

A. The first thing the boy said was the train.

Q. Of course, it is always broken by the train. He may have broken it himself.

A. If we put a little lace collar on this glass, which naturally is slippery——

Q. Very frail.

A. Very frail and slippery.

Q. Easily upset.

A. The train goes by and I go back in the window and I find the collar on the floor.

Q. The lace collars cannot be pinned to the glass stand?

A. Impossible.

Q. Just lay it on?

A. Just lay it on.

Q. And the vibration of the train comes along by that building and it falls off and lays on the platform.

A. On the floor.

Q. The hardwood floor in the window for show purposes?

A. Yes, sir.

Q. Not where people travel?

A. No, no.

Q. For the purpose of exhibiting the fine wares you have for sale?

A. The floor is not there for that purpose. It is the place to walk on. We use our own shoes.

Q. I know. You go in there to dress the window, but not used for the ordinary traffic about the store?

A. No.

Q. You don't go in with slippers on?

A. No, but if one of our eight or nine or ten dollar collars gets on the floor and lays there for a while it gets dusty and we have to sell it as soiled wear.

Q. Have you any collars that are worth eight or nine dollars?

A. I don't want to say at the present time, but we have had—would go some fifteen dollars.

Q. You have nothing above five dollars, have you?

A. I think so, yes.

Q. You have only been there on that corner two months?

A. Last two months.

Q. When was that leased by the Silverfield Company?

A. It was leased eight years ago.

Q. And then the Silverfield Company remodeled the whole thing—put in a glass front?

A. Yes, a short time ago.

Q. Took out the brick wall on Morrison street side and on the Fourth street side and put unsubstantial columns and put glass all around?

A. Put in just as good, substantial columns as can be put in any front.

Q. What kind of columns?

A. Iron columns.

Q. Two on the Morrison street side and two on the Fourth street?

706 A. And one on the corner.

Q. How much have you on Fourth street?

A. Fifty—about forty-nine feet.

Q. How much have you on Morrison?

A. About sixty-two feet.

Q. And you have one column on the Fourth street side, besides the corner?

A. And the supports for the doors.

Q. What supports are they?

A. On the corner that are 6x6.

Q. Wood or steel?

A. Wood.

Q. And what have you now to support that east wall of the three-story building where the glass is for the first floor?

A. Three columns.

Q. Column on the corner and a column in the middle?

A. And one on the end.

Q. What?

A. The brick wall, or end.

Q. So you have one column between the corner and the end where you connect with the brick wall on Fourth street?

A. Yes. There is the original old column there, if I remember right.

Q. They were taken out—were wood, were they not?

A. No, there is one or two, I think, brick columns in there.

Q. Then on the Morrison street side you have one column on the corner and then you have one column, and then——

A. On each side of the entrance.

Q. Each side of the door, and those are wooded columns?

A. No, those leading up to the balcony are iron columns, six inch columns.

Q. How many?

707 A. Two for the entrance and the wall on each side.

Q. The wall above is brick?

A. Brick.

Q. That was a very frail brick structure when built, was it not?

A. No, we think it all right.

Q. Who owns that building?

A. Rosenblatt.

Q. And it was rented about seven or eight years ago by Silverfield and then remodeled at his own expense about a year ago?

A. About two months ago. Well, we just got through.

Q. Just got finished up?

A. Just got finished up.

Q. Now, the railroad was there when Silverfield came there, wasn't it?

A. Oh, yes.

Q. Where was their first place before?

A. Somewhere on First street.

Q. First and what?

A. First and Salmon; somewhere up in there.

Q. And when they enlarged their business and wanted a more popular crossing they moved to Fourth and Morrison?

A. Yes, sir.

Q. And spent a good deal of money to remodel and get plate glass in?

A. Yes.

Q. And have been there ever since. Now, you say soot from these engines?

A. Soot, smoke and dust.

Q. It is oil burners, aren't they—these engines?

A. They throw it just the same—some dust, soot and smoke.

Q. Well, the dust don't come from the engine. It comes from the street.

708 A. That is true. The engines cause the dust to fly.

Q. Stirring it up?

A. Stirring it up.

Q. But no smoke or smut or cinders come from the oil burners.

A. I beg your pardon—smoke.

Q. There is smoke, but that is all?

A. Smoke—yes, there is smoke.

Q. Now, that smoke comes through your windows on the Fourth street side?

A. Fourth street side, yes, sir.

Q. And it goes through because you have to have them open?

A. Yes.

Q. And such goods as are exposed and not in the pasteboard boxes as ordinarily kept, of course get some of the effect of this smoke or dust, but aren't most of your goods kept in pasteboard boxes, under cover, except the cheaper lines?

A. Allow me to tell you, Judge. The question asked is where do you keep at the present time our furs and so on and so forth. I said keep the best ones under cover. We have gone to expense of between six and seven thousand dollars to fix up our store in the last three or four months on account of this smoke and dust, to keep these goods.

Q. Do you mean to say, Mr. Wentz, that you would not have gone to the expense of six or seven thousand dollars for cabinets and fixtures but for the carline on Fourth Street?

A. I don't think so.

Q. Don't you know that not a modern house in your line
709 anywhere in any city but what keeps its most valuable goods under cover?

Q. Well, in our business we like to sell our goods, and the more we show the better the sales.

Q. I understand, therefore you spend the money on show windows.

A. I want my goods on exhibition—display—I want them open and shown.

Q. Don't you know there is not a first class house in your line in any modern city that does not have cabinets to keep the majority under cover, and leaving out a few samples for the show windows?

A. Naturally. Not all of them. We cannot keep all in cabinets.

Q. I know; you keep your show windows, and have a cheaper lot on the shelves in boxes, such as linen waists of cheap character; but your silk waists, and all your valuable goods are kept under cover except those used in your show windows?

A. Oh, yes, naturally.

Q. And you would do that whether on Fourth street or Fifth or Sixth?

A. I don't think we would, but if on Fifth street we would not have to be so careful with our silk and that stuff as we do on Fourth street. I don't believe we would.

Q. But all houses in your line do so.

A. Oh, they take care of their merchandise.

Q. Do you know what rental Silverfield paid for that property there—those three floors?

A. No.

Q. It is very high, isn't it?

710 Mr. KAVANAUGH: He said he didn't know.

Mr. FENTON:

Q. Or do you know?

A. It is not very high—no—you see, we had the store when—well, I don't know this last lease that was made.

Q. Mr. Silverfield and Mrs. Silverfield are both in town?

A. He is not.

Q. Mrs. Silverfield is?

A. Yes.

Q. She would know?

A. Yes, she would know.

Witness excused.

711 A. S. BRASSFIELD, A witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Brassfield, what are your initials?

A. A. S.

Q. What is your business?

A. Book-keeper for A. B. Steinbach.

Q. How long have you been with that firm?

A. 21 years.

Q. How long has that firm been in business on Fourth and Morrison?

A. Eleven years, a little over.

Q. On Fourth street the West Side railroad line runs along the street on which this building adjoins for one hundred feet, doesn't it?

A. Yes, sir.

Q. And the Portland Railway, Light and Power Company's lines run along Morrison street in front of the building?

A. Yes.

Q. Mr. Brassfield, I wish you would explain to the Court what effect the running of steam locomotives on Fourth Street has upon your business. First, it is a general clothing business?

A. Yes.

Q. State to the Court what effect it has upon the conduct of your business there.

A. Well, one annoyance we have is that we have a cement walk, that is lighted with what we call the Jackson light system.
712 This light is from prisms set in the walk to reflect light in the basement. We are at an expense all the time to keep the cement around the prisms, to keep them from leaking. We have never been without a leak on the Fourth street side. We don't have any trouble with the Morrison street side.

Q. What causes that?

A. We think it is the vibration of the trains going by.

Q. Under similar conditions on Morrison street that doesn't occur?

A. We have never spent any money there.

Q. What other effect has it?

A. Well, another effect is the annoyance of transacting business. A customer being waited on by a salesman invariably has to stop conversation with the salesman until the train passes. And any one when using the phone has to stop until the train goes by, and also we feel it probably has some effect in causing us an expense in the way of replacing our electric light globes along in the Fourth street windows. Tungstens we have quit using in there because of the expensive globes, and they are very delicate. They went bad on us so quick we went back to the old style lamp. We feel that has been due to the vibration of the train.

Q. What effect has the smoke or dust?

A. Well, in the summer time, when we have our transoms open and a pretty heavy train going up with a couple of engines in front, and sometimes one behind when loaded and the atmospheric conditions are right, it makes some smoke come down and we get a little.

713 We never notice it so much in the store—once in a while some comes in, but our windows are hard to keep clean on that side. Kind of a greasy effect—I suppose the oil burners.

Q. Business all on the lower floor, is it?

A. Lower floor and basement.

Q. Very extensive business?

A. Well, we use our basement for salesmen's rooms.

Q. I say, you have a large business there?

A. Yes, sir.

Q. What is the effect on your business in these particulars from the operation of the electric cars on Morrison street, as compared with the steam locomotives on Fourth street?

A. Well, I don't notice any vibration from the Morrison street side.

Q. Have any trouble with your prisms along on that side?

A. No, never spent a dollar over there for fixing them. Continually spending, in fact, never without a leak some place on our Fourth street side.

Q. How far is the outer rail, the southern rail of the electric road, from your building, as compared with the west rail of the other road, the steam road—a good deal closer, isn't it?

A. No, there is a double track on Morrison Street; I would judge that the rail nearest our store on Morrison street would be a little nearer the store than the west rail on the Southern Pacific though I have never measured it.

Q. Morrison street is a sixty foot Street, isn't it?

A. I think so.

Q. And Fourth street is eighty foot?

A. That I don't know; I am not certain about it.

714 Cross-examination.

Questions by Mr. FENTON:

— Mr. Brassfield, how long has the firm of A. B. Steinbach & Company, by whom you are employed, been doing business at Fourth and Morrison?

A. Why, we moved up there, Judge, I think it was in 1898.

Q. And you formerly did business on First and Morrison?

A. First and Morrison.

Q. On First and Morrison. How much floor space did you have there?

A. We had 50 by 100.

Q. At Fourth and Morrison you have 100 feet square?

A. One hundred feet square, except a little space Heitkemper takes on the Morrison street side.

Q. How much space does Heitkemper take for his jewelry store?

A. 20 by 60; maybe 21 by 60.

Q. And you have the balance of the quarter block?

A. First floor and basement.

Q. Was the store constructed for you?

A. Yes sir.

Q. Russell Building?

A. Yes sir.

Q. Who owns it?

A. Mrs. S. D. Smith built it.

Q. Isn't it called—what is it called?

A. Russell Building.

Q. Russell Building. Two or three stories?

A. Two story building.

Q. What is the depth of your basement?

A. Nine feet in the clear.

Q. Is it mill construction or steel?

715 A. Steel pillars.

Q. How do you mean steel?

A. Ask the question again, please.

Q. Is it a building built with brick walls, or was it built with a steel frame?

A. Brick walls, I guess you would call it.

Q. Mill construction then.

A. On the first floor, you know, is no brick; all supported by steel pillars, the first floor. The next is brick.

Q. Isn't it a building with iron columns running up to the second floor, so you may have a glass front?

A. Yes, iron and glass.

Q. You have a plate glass front on Morrison street of one hundred feet—less on Fourth street?

A. Yes, sir.

Q. And you use that show window some?

A. Yes, sir.

Q. Then you have outside of the building, in the corner another show window?

A. Yes, sir; we call it a vestibule window.

Q. That tiled?

A. Runway.

Q. Runway into the corner and across the corner, for the convenience of the public and your patrons, and also to enable you to use that for a handsome show window?

A. Yes.

Q. And that is right on the corner of Fourth and Morrison, and there you have fine hats and goods you want to show as samples?

A. Yes, I use that as a display window.

Q. Yes, and then the North window, on Morrison street, a distance of about 88 feet, 78 feet, is also a show window, with oak
716 floor, and a curved background to shut off the store from the goods on exhibit?

A. Well, the windows are encased inside; not oval, but square top.

Q. Square; I thought it was oval. That has plate glass on that side?

A. Yes, sir.

Q. All specially built for A. B. Steinbach & Company for the purpose of carrying on the business of a clothing dealer—high class clothing dealer is the business you follow?

A. Yes, sir.

Q. Now, isn't it true, Mr. Brassfield, that these prisms that you speak of are simply squares of glass about two and a half by two and a half inches in area and about three-quarters inches in thickness that are let into cast iron frames and are cemented or fastened in there as they are laid in the walk?

A. Well, you haven't got the shape; it is round.

Q. Are yours round?

A. Round, and has a projection on the inside about that long (illustrates); flat on one side to reflect the light—throw the light in the basement.

Q. Ordinary sidewalk prism light?

A. Yes.

Q. Some square—lots are square. Those that were put in five or six or seven years ago are round or oblong.

A. Round.

Q. Now, isn't it a fact, and haven't you observed it to be a fact, that these prism lights that were out in the sidewalk to light the basements, that were put in and installed more than eight
717 years ago are much more unsatisfactory than the ones that are now being put in that are square and laid in cement and covered all over and buried in cement, and afterwards cleaned on top and cleared so you can see them?

A. I cannot—I have never been in a basement where the last kind you speak of are being in use. Our own basement is the only one I know.

Q. Do you know that in front of Meier & Frank's, over on the Morrison street side, or on the Fifth street side, I am not certain which, the old style prism lights are used, and on the Sixth street side you have the square prism light? You have noticed those?

A. From the outside, yes, sir.

Q. Haven't you noticed in going along those sidewalks with the old style prism lights there would be half a dozen places where there were holes in the walk—where the light was entirely out, frequently, on those streets?

A. Yes.

Q. Have you ever seen one of those prism lights that were square and buried in the cement when they are laid that were out, except knocked out with a hammer, something of that kind?

A. I don't know but it is just as easy to knock them out as round ones.

Q. Not near; They knock out by walking over.

A. Newer thing.

Q. As a matter of fact, those lights you have there in that sidewalk are lights of the old style?

A. Yes, but they leaked immediately after being put in, and have been leaking ever since.

718 Q. Never were effective.

A. The best thing in the market at that time, the Jackson light.

Q. But now aren't being put in anywhere in the city?

A. They may be.

Q. Now, these Tungsten lights—they are very delicate lights—the wires. Did you ever notice that those lights will not jar out or anything affect them while they are burning, but that they will break when they are cold?

A. Never noticed that.

Q. Never noticed that. Now, don't you know, as a matter of fact, that the General Electric Company are supplying an improved light to substitute for the Tungsten burner for that reason, that this is so delicate that the slightest vibration when it is cold will break the light and the next morning when the current is turned on it is gone. Don't you know that is a fact?

A. No, I don't.

Q. You have discontinued the use of the Tungsten burner, have you?

A. Yes, we thought it too expensive on that side.

Q. They are of recent introduction—rather recent?

A. We only tried them, some little while *while* ago—they went too quick for us.

Q. Mr. Brassfield, do you know what rental Mr. Steinbach pays for that 100 feet square?

A. Yes.

Q. What is it?

— \$15,000 a year.

Q. \$1,250 a month.

A. The entire building.

Q. He gets the upstairs too?

A. Yes, sir.

719 Q. And he leases the upstairs and gets rent? How many floors?

A. One.

Q. How many offices?

Mr. KAVANAUGH: If the Court please, what has this to do?

Mr. FENTON: I want to show the valuable corner next the railroad.

Mr. KAVANAUGH: The location makes it valuable.

A. I think there is fifteen or sixteen rooms, I cannot just tell.

Mr. FENTON:

Q. Used as offices?

A. Yes, sir.

Q. When you left First and came up to Fourth street you came voluntarily?

A. Yes, sir.

Q. You knew the railroad was there?

A. But we didn't know—we came to Fourth street because of getting a location on Morrison street.

Q. You were on Morrison street when on First?

A. Yes. We knew the railroad was there, ran there all the while.

Q. And you came, notwithstanding its burdens and benefits?

A. Yes.

Redirect examination:

Q. Now, the prism lights, the basement lights, on Morrison street, have stood the wear better than those on Fourth street.

A. Yes.

Q. And how about the Tungsten light on Morrison Street?

A. They never gave us as much trouble.

Witness excused.

720 JOHN B. CLELAND, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Judge, you are on the Circuit Bench, are you?

A. Yes.

Q. How long have you been on the bench?

A. 8th of January, 1898.

Q. And constantly engaged in hearings in the County Court house during Court time?

A. Considerable portion of the time, yes.

Q. Have you held court in all of the different Court rooms in the Court House there?

A. Yes.

Q. Four different Court rooms upstairs?

A. Yes.

Q. Where do you hold Court now, or what is your Court room?
A. No. 3, the room that is usually known as Department 2 on the East side of the building.

Q. The building has been somewhat narrowed on the East side on account of the construction of the new Court House?

A. Yes, a portion of the chambers of the judge and a portion of the Court room cut off.

Q. What is the effect, Judge, during the hearing of cases of the passage of locomotives and trains on the Fourth street railroad?

A. What is the effect upon—

Q. Upon the hearings in the Court room.

A. Must be suspended until the trains have passed.

721 Q. Is that true of both passenger and freight trains?

A. Yes.

Q. How many trains generally pass during the day, if you remember?

A. I don't remember the exact number.

Q. Two or three in the morning and two or three in the afternoon?

A. I should say not less than two in the morning and probably three in the afternoon, but there is one train that seems to be irregular, and some switching.

Q. Do single engines run up and down occasionally?

A. Yes, about once a day.

Cross-examination.

Questions by Mr. FENTON:

— About how long will this interruption be, at the time the train is passing, as you remember?

A. Why, I cannot tell you, Mr. Fenton. It is an appreciable length of time.

Q. A minute or a minute-and-a-half?

A. When the train arrives, say, at the corner until it has passed off from the next block above.

Q. While it is running 200 feet?

A. Yes, or more than that.

Q. About 200?

A. 300 to 320.

Q. The width of the block is 200 feet, and the two streets—80 feet—320 feet; and while the train is running, passing over that space, public business is interrupted by the noise and movement of the train?

A. A little bit more than that. When one train passes—
722 they send out one train that has two engines. That takes more time.

Q. Since when have they removed the east portion of the court house? When was that done?

A. That was done in vacation last summer.

Q. And what is that wall that is next to the Fourth Street side, between your courtroom, or the courtroom over which you now preside—what kind of a wall is that? A plank wall?

A. What has been put in since they cut down the building is only plank-boards, and papered on the inside.

Q. Temporary arrangement?

A. Yes, since last June, or since last July.

Q. The county is now engaged in building a courthouse to occupy the entire block, as I understand.

A. Well, I presume so. Nothing laid out except the east side.

Q. Do you know the size of the new part being laid out on the east of the present building there? About what the size is?

A. I have understood it to be 70 feet wide, 200 feet long.

Q. And as far as they have progressed is the excavation and the building of the piers?

A. Yes.

Redirect examination.

Q. I forgot to ask, Judge; what is the effect in Judge Gantenbein's department, or the department which is at the north?

A. Substantially the same. Of course you can hear now more distinctly in No. 3 than you can in No. 4?

Q. Yes.

A. But the passage of the trains renders it necessary to suspend business in either of the courts.

Witness excused.

723 A. L. BARBUR, a witness called on behalf of the defense, being first duly sworn, testified as follows.

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Barbur, what official position do you hold in this City?

A. Auditor of the City of Portland.

Q. How long have you been Auditor?

A. Since July, 1907.

Q. In your position as Auditor, are you present at the Council Meetings that are held in the Council Chamber in the City Hall?

A. Yes, sir.

Q. Also at some committee meetings held there?

A. Yes, sir.

Q. Mr. Barbur, what is the effect on public business in the Council Chamber of the Council, the Executive Board or other boards or committees of the running of steam locomotives on Fourth Street?

A. Well, business is always suspended; always has been since I have been there, when the train first comes within reasonable hearing distance, business is always suspended.

Q. And continues suspended until it is passed?

A. Yes.

Q. Are some of the trains pretty long?

A. Well, the noise of the trains that have double headers—that is, the engines running in front and sometimes three engines, particularly, the noise is made so that it interrupts the proceedings while the entire train is passing; of course, the one engine ahead, or two as it might be, and the engine coming behind.

724 Q. Is there any distinct vibration in the Chamber?

A. I think there is a rumbling there always more or less.

No cross-examination.

Witness excused.

725 THEODORE KRUSE, a witness called on behalf of the defense, being first duly sworn, testified as follows.

Direct examination.

Questions by Mr. KAVANAUGH:

— Your name is Theodore Kruse?

A. Theodore Kruse.

Q. What is your business?

A. Hotel and restaurant.

Q. Where is your place of business?

A. On Fourth and Alder street.

Q. What is known as the Belvedere Hotel?

A. Belvedere and Louvre.

Q. Louvre. How long have you been engaged in business there,

Mr. Kruse?

A. Three years.

Q. Were you engaged in business prior to that?

A. On Fourth and Stark.

Q. Kruse's Restaurant?

726 A. Yes, sir, Kruse's Restaurant.

Q. Does the Fourth Street road run in front of your building?

A. Yes, sir.

Q. Mr. Kruse, what is the effect on your business there of the operation of steam locomotives on the railroad line on Fourth Street?

A. Well, the train and locomotives that are passing the lobby or the office of the hotel particularly,—we have to suspend business. We cannot converse with guests nor can we converse through the phone, and the guests particularly complain. It inconveniences a great deal because we have a great many long distance calls which must be interrupted and the line held open during the time the train passes as the rumbling noise of the train makes conversation absolutely indistinct.

Q. What, if any, effect does the smoke and the dust and the cinders have on your business?

A. Dust and cinders I have not noticed any, except dust and cinders. A great deal of smoke at times—a great deal depends upon the atmosphere, whether the atmosphere is heavy or not, and the direction of the wind. But at certain times all our rooms which are generally open for ventilation will be full of smoke after the train passes and in fact at times it is so bad we must close our transoms in the public diningrooms in order to keep the smoke out.

Q. What effect has it on the public diningroom, Mr. Kruse?

A. Well, it has that effect as far as the smoke is concerned. If the atmosphere is heavy the smoke will come through the windows

and transoms, if open, and will generally—I have instructed the men to close the transoms whenever the train passes.

727 Q. You mean to keep them open for ventilation during most of the time, do you?

A. Oh, yes, we have them open.

Q. Is there any vibration noticeable in your building?

A. I couldn't say anything about vibration.

Q. What effect has it upon your guests in the hotel?

A. It causes a great deal of inconvenience. The guests who know the house and have been with me before, will not take a room on the Fourth Street side if they can get a room on the Alder Street side, and when they take a Fourth Street room, it is with the understanding that they will be moved the next day so that causes, of course, a great deal of inconvenience.

Q. How about the transients who are staying in these rooms, do you have any complaint?

A. Oh, yes, I generally keep them only one night and then, of course, if I move them into the Alder Street side I can keep them more than that.

Q. Do your Alder Street rooms rent better than the Fourth Street rooms?

A. Yes, for that reason.

Cross-examination.

Questions by Mr. FENTON:

— What difference do you make in the charge for your rooms on Fourth Street and rooms on the Alder Street side?

A. We do not make any difference.

Q. You get the same rent per room for rooms on the Fourth Street side as you do on the Alder Street side?

A. Yes.

Q. Well if the transients, Mr. Kruse, would only stay in the rooms on the Fourth Street a night, and you lose them on
728 account of the noise, what do you put them there for?

A. Well, I cannot very well send them away as long as I have a room.

Q. I see. Now, how long have you been running that hotel, you say?

A. Three years.

Q. The Belvedere Hotel there was the old——

A. Holton House.

Q. Holton House, run by Dan Holton for a great many years?

A. Yes.

Q. How long has it been an hotel?

A. Well, to my knowledge it has been twenty years.

Q. Built by John Wilson, wasn't it?

A. I believe it was.

Q. And owned now by the Wilson estate?

A. I think so.

Q. 100 feet square?

A. 100 x 75.

Q. 100 on Fourth Street and 75 on Alder?

A. No, 75 on Fourth.

Q. Did it adjoin the Rosenblatt property?

A. Yes, now owned by Sweeney.

Q. Now Lipman & Wolfe's Annex, Department store?

A. Yes.

Q. The old Rosenblatt home, wasn't it.

A. I believe it was.

Q. That is, Gus Rosenblatt's father, and S. Rosenblatt?

A. Yes.

Q. That was built primarily for an hotel, wasn't it, that building?

A. So I understand.

729 Q. And the Louvre is your restaurant? And what floor space does that cover?

A. The Louvre covers about 50 x 70 approximately.

Q. That is a popular modern restaurant?

A. Yes.

Q. And serves and caters to the public outside of the guests at the hotel?

A. Yes, sir.

Q. And you have an orchestra there in the evenings, and serve fine dinners to the public. That is right, isn't it?

A. Yes, sir.

Q. And it is a popular resort?

A. Yes.

Q. I will ask you what kind of light you use in the restaurant?

A. We use electric light.

Q. Brilliantly lighted with electric lights at night?

A. Yes.

Q. You expended a great deal of money to remodel that room, didn't you?

A. Yes, I spent considerable money.

Q. You went from Fourth and Stark, the one story or two story brick, owned by Rufus Mallory, where you maintained Kruse's restaurant for a number of years, and selected this site for your place of business?

A. Yes.

Q. When did you make the change?

A. About three years ago?

Q. How long were you at Fourth and Stark?

A. I was there about ten years.

Q. And you conducted a successful business there, didn't you?

730 A. I did.

Q. And are conducting a successful business at Fourth and Alder?

A. Yes.

Q. Are you there under a time lease?

A. Yes.

Q. How long has your lease yet to run?

A. Two and a half years.

Q. May I ask what rent you pay?

A. Eight hundred a month.

Q. For the entire building?

A. Yes.

Q. And you sub-let any?

A. Nothing, no.

Q. You pay all the taxes and insurance?

A. No, I pay nothing.

Q. You just pay Eight hundred per month?

A. Yes, just the rent.

Q. Have you applied for a renewal?

A. Not yet, no, sir.

Q. Do you have any trouble with your side-walk lights in your basement?

A. No, I have no sidewalk lights.

Q. The basement does not go out under the side-walk?

A. No, sir.

Q. I mean the basement does not extend?

A. No, the basement does not extend.

Q. You have street lights, do you?

A. Yes, sir.

Q. What are they?

A. Gas.

Q. Do you use any Tungsten burners?

731 A. No, I do not.

Q. Never installed them?

A. Yes, I used some a few dozens or so, but they broke within a very short time so I did not renew them.

Q. That has been the experience of most of the customers of that light as far as you know?

A. I understand so.

Q. Without reference to where the building is located?

A. I believe that is so.

Q. Now these long phone conversations—long distance conversations, your phone is in the open, is it, or is it in a room?

A. No, in a booth.

Q. Door closed,—wooden booth?

A. Yes, long-distance booth.

Q. And you cannot talk over long-distance if the door is closed in the booth?

A. No.

Q. Is the booth next to Fourth Street?

A. Yes, sir.

Q. Up next to the wall?

A. Not against the outside wall, no.

Q. Close to the entrance?

A. I should say fifteen feet.

Q. Interrupted for a minute or minute and a half while the train goes by?

A. Only during the time of the passage of the train.

Q. Whatever length of time it is.

Redirect examination.

Questions by Mr. KAVANAUGH:

— Do you know whether the destruction of your Tungsten lamps was caused by the trains?

732 A. No, I never inquired into the cause of it.

Witness excused.

733 BEN SELLING, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Selling, you have lived in the City a great many years?

A. Yes, sir.

Q. How many years?

A. Forty.

Q. Forty years. You are at present State Senator for this County?

A. Yes, sir.

Q. Where is your place of business?

A. Fourth and Morrison.

Q. How deep is your floor on Morrison Street?

A. Sixty-five feet.

Q. On Fourth Street?

A. Practically 100 feet.

Q. And how many stories in height?

A. Two stories at present.

Q. The Fourth Street car line runs along the Fourth Street face of your building?

A. Yes, sir.

Q. Will you tell the Court, Mr. Selling, what effect the operation of the steam locomotives and cars on that road has upon your business, clothing store business?

A. I don't understand the question,—you mean in the abstract?

A. No, particularly. What inconvenience or discomfort or
734 annoyance, or injury it causes.

A. During the passage of trains the building shakes.

Mr. FENTON: Louder.

A. During the passage of trains the building shakes perceptibly. The smoke at times creates a little inconvenience.

Q. What effect does it have on conversation with your customers?

A. During the passage of trains it is a little difficult to carry on transactions.

Q. How does it affect the telephone?

A. I never paid any attention to the telephone.

Q. You don't notice that?

A. No.

Q. How does it affect the life of your lights?

A. I am not able to say. We have just installed a new light and I do not—

Q. How is it on your old light?

A. Well, that is very poor, because— We are using a new light and it is not a Tungsten light and we find that a great many lamps are broken. I would not be in a position to say that it was occasioned directly by the trains. Pretty near all the lights in our windows are slanting. We have quite a large number of lamps broken. I could not compare because recently installed.

Q. How are the lights on Fourth Street as compared with the lights on Morrison?

A. I could not tell you. I do not know.

Q. Has the vibration any effect upon your company's show windows?

A. No, sir.

735 Cross-examination.

Questions by Mr. FENTON:

— Senator Selling, when did you open up your place of business there on Fourth and Morrison?

A. Ten years ago.

Q. And you remodeled that store and expended considerable money to put in show windows and plate glass?

A. Yes sir.

Q. That building has been there for twenty-five years, hasn't it?

A. Yes, sir.

Q. Who constructed that originally?

A. Sir?

Q. Who constructed that originally?

A. That belongs to the Mann estate. I think the Pete Hardman estate.

Q. Did you buy the property?

A. No, sir.

Q. You have a lease?

A. Yes, sir.

Q. What rent do you pay for that?

A. Twelve hundred.

Q. A month.

A. Yes, sir.

Q. You have how much space?

A. I rent 100 feet on Fourth and 100 on Morrison,—I sublet a part.

Q. You have two floors?

A. I have the entire building and only occupy the part of two floors.

Q. A three-story building?

A. Yes, sir.

Q. What is it used for upstairs above you?

A. I intend to occupy a part of the third floor myself.
736 The other part is vacant.

Q. Is it loft construction,—I mean all one large room—the third floor?

A. Will be all one when I get through. I am making alterations now.

Q. When did you take such lease?

A. 10 or 11 years ago.

Q. How long a term?

A. Originally 10 years. My original lease expires next July.

Q. And did you get it renewed?

A. Yes, sir.

Q. How long a term?

A. Three years.

Q. Same rental?

A. No, sir.

Q. Increased?

A. Fifty per cent. increase.

Q. Twelve hundred and fifty?

A. Twelve hundred. We will have to pay Eighteen hundred after next June-July.

Q. So that rents have advanced about 50% during the time you occupied the property?

A. Yes, sir.

Q. When you went there the freight trains were operated on Fourth Street just as they are now?

A. Yes, sir; not so frequently, but they were there.

Q. Passenger trains were operated but not quite so frequently?

A. Yes, sir.

Q. Where were you before you came to Fourth Street, what place of business?

A. Sir?

737 Q. Where were you before you came to Fourth Street?

A. I was on Third and Oak and am still in the same place.

Q. Have another place of business down at Third and Oak?

A. Yes, sir.

Q. Near what was formerly the—

A. Sherlock Building, Third and Oak.

Q. You came to Fourth and Morrison as an improvement on this?

A. Yes, sir, I rented that on account of the location.

Q. About ten years ago?

A. Sir?

Q. About ten years ago?

A. Yes, sir.

Q. What is your line of business?

A. Clothing and gent's furnishings.

Q. Special line of clothing and gent's furnishings?

A. Men's and boys'.

Q. No trouble with your show windows so far as the goods falling down?

A. No, sir, never had any trouble on that account.

Witness excused.

738

C. K. HENRY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Henry, how long have you lived in Portland?

A. Twenty years.

Q. Engaged in the real estate business?

A. Yes, sir.

Q. Most of the time?

A. All of the time.

Q. Where is your office now?

A. Corner of Fourth and Oak.

Q. Who owns the building where your office is?

A. I do.

Q. When was that constructed?

A. Just about finished now.

Q. How long have you been in that building?

A. A little over two months.

Q. The Fourth Street line runs in front of your building?

A. Yes, sir.

Q. You have had occasion to observe the noise and—

A. Yes, sir.

Q. —vibration caused by the railroad?

A. Rumbling, yes, sir.

Q. What effect has that on your business and on your building?

A. Well, I don't know as it has any effect on the business. As to the building, I bought the ground a year ago in July. That was after they had agreed, or as I understood it, had agreed that this heavy service would be removed from this street, and in leasing my buildings, leasing the offices to tenants, I always used that as an argument why they should come over to that new location. A great many objected on account of the railroad on Fourth Street. I said, it is only a matter of a few months until they will move away.

Q. Did you find that the tenants took that into view when they were making leases?

A. Yes, sir, a good many did.

Q. Seeking locations?

A. A great many did.

Q. General objection to the railroad?

A. They always endeavored to get lower rents on account of being on Fourth Street.

Q. Do you know what effect the railroad has thereon—You have engaged to a considerable extent in buying and selling real estate, have you not?

A. Yes, sir.

Q. Do you think it has any effect on the value of the real estate?

A. Yes, property is less valuable on Fourth Street than it is either on Third or on Fifth on account of the steam railroad. If it was electrified I do not think it would damage it at all.

Q. You think property would be as high there?

A. Just as high.

Q. What percentage of difference would you say there is?

A. I should say from 10 to 20 per cent.

Q. Where is your office located with reference to the street?

A. Mine is right on Fourth Street.

740 Q. How high up?

A. On the street,—first floor.

Q. Are your phones near the street?

A. Some of them; we have several.

Q. How does it affect telephone conversation?

A. When a train is passing we have to suspend.

Cross-examination.

Questions by Mr. FENTON:

— Mr. Henry, when you say they had agreed to remove their heavy traffic on Fourth Street, to whom did you refer, and how did you get the understanding?

A. The understanding was at that time, I believe was, that the Council had served notice they should move, and the company agreed to take off the heavy trains, and were going to switch them around by Milwaukie and Oswego.

Q. You didn't understand there was any agreement with the City on that subject?

A. We understood—

Q. Rumor, I suppose?

A. Yes, sir, newspaper statement.

Q. You know, as a matter of fact that the company said when this matter was under discussion that it did expect to build its Beaverton and Oswego—

A. Cut-off.

Q. Cut-off,—and it would then probably remove most if not all of its freight traffic, but it still insisted upon its right to own its franchise and operate its trains there and that was satisfactory to the Council?

A. The impression I had and nearly all the tenants who brought up the question would say, they were going to build a cut-off and run freight trains around, and it wouldn't be long until they

741 would electrify this part or put on gasoline motors.

Q. That was not a matter of agreement?

A. I do not know as to agreement.

Q. But a matter of policy and convenience on the part of the company.

A. Yes, I think that is all right.

Q. And you don't know but what that is the intention of the company now?

A. Don't know; only saying my impression at the time.

Q. As a matter of fact, the ordinance here attempts to prohibit the use of that line for freight business at all. You understand it that way, don't you?

A. I really paid no attention to the ordinance, only just what I have seen published in the papers.

Q. As a matter of fact, Mr. Henry, you bought that quarter block where your building now stands—

A. Yes.

Q. At a price of \$125,000.00?

A. Yes.

Q. You paid \$115,000.00?

A. No, I paid more than that.

Q. Well, the owner's price was \$125,000 and you got a discount?

A. I got a discount but paid more than \$115,000. I have forgotten just what.

Q. You built the building at a cost, probably of \$150,000?

A. A little less than \$150,000.

Q. Six story office building?

A. Yes, sir.

Q. Mill construction with some steel?

A. Steel and iron columns, yes, sir.

Q. Yes. Now, that building was open for tenants when?

742 A. I think we began about the first of November with a few on the ground floor.

Q. And what percentage of the building is now occupied?

A. About 90%, nearly 95%.

Q. That is to say, you opened this office building to the public November 1st and now, on December 3rd it is 95% full.

A. Yes, sir.

Q. Satisfactory time leases in most instances?

A. I am satisfied.

Q. Rentals entirely satisfactory to you?

A. Yes, sir.

Q. You have a department of the United States Post Office there?

A. Yes, sir.

Q. Under a long time lease?

A. Yes, sir.

Q. And you have some other public offices?

A. Yes, I have made a great many efforts to get them there, Mr. Fenton. It is a very comfortable, attractive building and I induced them to come.

Q. A good many tenants who argued with you that your rates were too high, they wanted lower rates they said because of the Fourth Street train being there?

A. Well, yes.

Q. You succeeded in convincing them that the rates were reasonable, and got 95% or 90% occupied?

A. I did so by holding out the inducement that the line would be discontinued.

Q. Certainly we all hope it may be modified in some respects. As a matter of fact that building was finished and opened to the public November 1st and is now 95% full.

A. Yes, sir.

743 Q. How many offices are in that building?

A. 155.

Q. May I ask you what your gross income would be?

A. About \$3200 per month.

Q. And your operating expenses?

A. Well, that is a question yet. I am buying heat from across the street and am having negotiations with the electric company.

Q. Won't it be fully \$700 a month?

A. Yes, it will.

Q. Between \$700 and \$800?

A. Not counting taxes and insurance.

Q. Leaving \$2500 net, exclusive of taxes and insurance?

A. You are getting some information here about real estate to-day.

Q. Now, you say that values on Fifth Street are from 10% to 20% more than on Fourth Street?

A. No, I think property on Fourth Street would be from 10 to 20% higher in value than it is now if the steam road would be electrified.

Q. In other words you think Fourth Street a better street than Fifth Street if the railroad was off?

A. If it had a similar electric line?

Q. Yes.

A. I do.

Q. Don't you know as a matter of fact, Mr. Henry, the history of this town has been Front Street first; First Street next; Second Street, because being the Chinese quarter, rejected; Third Street for many years as a principal thoroughfare of the City and now second class because of the lack of modern buildings on it;

744 Fourth Street comes next, then Fifth Street, the last three years built almost entirely new from Morrison to Ankeny on both sides of the Street.

A. Yes, sir.

Q. And has a double street car line upon it; then Sixth Street comes next with large modern buildings on it, and Seventh Street is approaching the same.

A. Yes.

Q. The growth of the City then, with modern buildings, is West of Third Street, isn't it?

A. That has been the last two or three years, but I do not think it will continue.

Q. No, we hope it won't because it would go up to Tenth and leave us. But the largest department store of the City is being built to-day between Tenth and West Park and Morrison and Alder?

A. Yes, sir, and I think they are making a mistake—a big mistake in doing so.

Q. That is Olds, Wortman & King?

A. Yes, sir.

Q. The former home of Governor Pennoyer?

A. Yes, sir.

Q. One of the largest office buildings in the City is being built

to-day by the Portland Railway Light & Power Company at Seventh and Alder; nine stories high and 100 feet square?

A. One of the large ones.

Q. Ben Selling, who was a witness here, paid \$270,000 for less than a quarter of a block on Sixth and Alder this last summer?

A. Yes, sir.

745 Q. The largest department store in the Northwest is on Sixth and Alder?

A. Yes, sir.

Q. 11-story, modern steel building?

A. Yes, sir, it is just finished.

Q. The Wells-Fargo Building is on Sixth and Oak, a 12-story building, the largest in the city?

A. Yes.

Q. So the growth of the city is west, and it has flowed over Oak Street, hasn't it?

A. Over Oak.

Q. Flowed over and beyond Oak Street?

A. Yes, sir, on Fourth.

Q. I mean Fourth.

A. Yes, sir.

Q. On Fourth and Oak there is the Board of Trade Building which cost between five and six hundred thousand dollars, and the Chamber of Commerce Building, covering the south half of that block, eight stories high, with plans adopted to make it two stories higher?

A. Yes, sir.

Q. Office building entirely?

A. Yes, sir.

Q. One hundred feet, eight stories high.

A. Fourth Street side.

Q. The Lewis Building, a ten story concrete building, corner Fourth and Oak?

A. Yes, sir.

Q. Sixty by one hundred feet, devoted entirely to offices. Do you know what percent is taken?

A. No.

Q. The building will not be completed for probably ninety days yet.

— — —

746 By Mr. KAVANAUGH:

— Will you take the stand and testify?

Q. Isn't that true, it will not be completed for 90 days?

A. That is my impression.

Q. You know that from your observation?

A. Yes, sir.

Q. And the Board of Trade Building is an office building modern and complete in every particular, and occupied by offices exclusively?

A. Yes, sir.

Q. Completely filled, isn't it?

A. I think so.

Q. And a waiting list?

A. I think so.

Q. Yes. The Weinhardt block covers the whole block between Oak, Pine, Fourth and Fifth?

A. It does.

Q. Seven story building?

A. Yes.

Q. Completely rented?

A. Yes, sir, on old leases.

Q. Haven't they adopted plans to make that an office building at the expiration of the present leases?

A. I do not think so. I am trying to persuade them to do it, as you can readily understand for your benefit and mine.

Q. Isn't it a fact the modern office buildings going up now within two or three blocks from the Lewis Building or your building has a waiting list before completed?

A. Yes, sir, any good office building, conveniently arranged.

Q. But on Fourth Street it would make no difference?

747 A. If on Third or Second Street now, if well built and well planned, with plenty of light and air, they would be just as much sought for as where they are.

Q. The ground, and in fact the properties, in your judgment, that are now on Fourth Street, would be more valuable if the steam road were removed?

A. Oh, yes. I have no hesitancy in saying that.

Q. If an electric line was substituted? An electric line would benefit the whole street through there?

A. Yes, sir.

Redirect examination.

Q. What you would like to have, Mr. Henry, would be for this company or some other to retain this franchise on Fourth Street, and convert that into an electric suburban and city line?

A. Yes, sir.

Q. Would be a public benefit?

A. Yes, I think it would, if the steam was off and electric on.

Witness excused.

748 Mr. A. C. McMICKEN, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

I would like to call this witness a little out of order in rebuttal.

Q. Mr. McMicken, what is your business?

A. I am contract agent for the Portland Railway Light and Power Company.

Q. Are you familiar with what is called the Tungsten light?

A. I am.

Q. How long has that been introduced and in use in this city?

A. About a year and a half.

Q. What character of light is it, as to delicacy of operation, if I may use the expression?

A. The Tungsten lamp is—has a metal filament and is a new discovery in the way of an electric light. The peculiarity of the lamp is the delicacy of the metal filament. By delicacy I mean that the light will not stand severe jars.

Q. What experience have you had with respect to this lamp throughout the City as to breakages on account of the delicacy of the lamp?

A. Well, we have had quite a little breakage and still, probably the last six months we have not had as much as previous to that time due to improvements.

749 Q. Is the lamp under process of improvement so as to avoid this delicate thing which is affected by vibration or by currents of air or whatever may affect it?

A. Yes, the process of manufacture has made an improvement in the lamp. The Tungsten metal is the same as in the original lamp and the process of manufacture has been improved and the suspension of the filament has been so changed that the percentage of breakage has been greatly reduced.

Q. How much has that percentage been reduced by reason of the improvement?

A. In the last six months, or eight months I think it has possibly been reduced one half, is our experience.

Q. And would you say, as an expert, or dealer whether it can be still further reduced in your judgment, or would you be able to say?

A. I do not think they can make very great changes in the lamp as it stands at present.

Q. Is there another lamp that is taking its place, serving the same purpose, do you know?

A. There are other lamps being introduced which give practically the same light but their efficiency as to electric current consumed is not as high.

Q. Now, what experience have you as to the lights which your company has installed on Fourth Street, I mean public lamps, if you have any?

A. Well, the only place we have Tungsten lamps on Fourth Street that the company maintains are in some ornamental boulevard posts on the curb lines.

Q. Where are they?

750 A. Well there are two posts on the Southwest corner of Fourth and Morrison Streets; one post on the northeast corner of Fourth and Washington Streets, that I recall at the present time.

Q. They are installed for Steinbach & Company at Fourth and Morrison and for Woodward and Clarke at Fourth and Washington?

A. No, for the Harrington Cigar store, cata-corner from Woodward & Clarke.

Q. What has been your experience as to breakage in these Tungsten lamps during that time?

A. We have had no greater breakage there than any place else in the city. They average better than 800 hours life a lamp.

Q. That is the breakage on Fourth Street is no greater than elsewhere?

A. Not on these boulevard posts.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Has been considerably greater in Mr. Gray's store on Fourth Street than on Morrison Street side?

A. I could not say as to that; we do not maintain or renew free of charge Tungsten lamp installations in any of our customers' premises; therefore we have no record of that.

Q. You don't know anything about his light?

A. I know what his lights are, yes, sir.

Q. You remember his going up and making complaint to the company concerning them?

A. When he first put in the installation, he complained about the lamps breaking and burning out, but I have seen no complaints from him lately.

Q. He has just testified on the stand here that the jar and vibration of the car put out his lights on Fourth Street to a much greater extent than on Morrison Street.

A. Well, I could not say as to that; we have no records.

Q. You have no reason to know but what that is true?

A. I don't know anything about it.

Redirect examination.

Q. Just one question, I did not ask, with the Court's permission—does this Tungsten lamp break when the current is on, and it is lighted, or do they break when cold, and the current off?

A. Usually when cold.

Q. Can you explain the reason why?

A. Yes, sir.

Q. Why?

A. Due to the composition of the filament; the filament of the Tungsten lamp is a metal filament, and it is of such a nature that in the manufacture of the lamp, the metal cannot be drawn as iron or steel is ordinarily drawn, but the metal filament is made by heating to a very high heat, and squirting it through steel dies, and making the thread used as a filament of the lamp. Of course, the different size lamps have different size filaments, and the smaller the lamp, the smaller the filament, and necessarily very brittle and break under less strain than the larger size lamps. Of course the

752 metal acts the same as any metal when it is warm. It expands to a certain extent and is more pliable. Therefore when the current is on there is very little liability to break.

Q. When the current is off, and it is cold, it is liable to break in the small filament?

A. Yes, sir.

Recross-examination.

Q. Exceedingly sensitive to jar and vibration?

A. Well, more sensitive than any other form of light, yes.

Witness excused.

753 F. COOPER, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Mr. Cooper, what are your initials?

A. "F."

Q. What is your business?

A. Superintendent of Transportation for the Portland Railway, Light & Power Company.

Q. Are you able to say, Mr. Cooper, how many cars of your company cross Fourth Street daily? I mean how many crossings are made at, perhaps, any smaller space of time than a day would be.

A. I can by referring to notes I made.

Q. Have you the notes with you?

A. Yes.

Q. Just refer to them.

A. What particular crossings do you want?

Q. I want the crossings at Glisan, Burnside, Washington and Morrison. Are there any crossings besides those?

A. Glisan, Burnside, Washington and Morrison.

Q. Does the Fifth Street cross?

A. That is stopped now. At Fourth and Glisan, there are 632 cars cross per day; that is, crossing there one way or the other.

Q. At Burnside?

A. At Burnside there are 645.

Q. At Washington?

A. At Washington, 1105.

Q. And Morrison?

A. Morrison, there are 552.

Q. Have you totaled that?

A. Well, those are the totals.

Q. I mean altogether?

A. No, I didn't.

754 Q. What hours do they run between?

A. Well, from—

Mr. FENTON: That is twenty four hours.

Mr. KAVANAUGH: There is part of the day they don't run.

A. That is figured on a nineteen—eighteen hour basis. These figures are—I would not say they are to one; in this '1105 it might be 1106, or it might be 1104, but I have took them from our schedules; they would not vary more than one or two crossings.

Q. State to the court if you know how much time is lost by the cars and people in the cars, by reason of the crossings of the Fourth Street road across these tracks—as to whether it is considerable or not.

A. Well, we never pay any attention to the time on the Fourth Street line at all.

Q. But a car has to come to a stop and wait until the train passes, however long a time it is?

A. Yes, but our schedules are so arranged that——

Q. You make allowance for that?

A. We make allowance for little stops like that.

Q. You have noticed it often, at times, haven't you, Mr. Cooper, that it stops several of your cars?

A. Yes.

Q. Some times three or four?

A. On Washington Street, it don't take long for three or four cars to pile up.

Q. What effect does it have on pedestrians; do they crowd up when a long train is run through?

A. Well, yes they are crowded up just the same as the cars; I have noticed when I have been on the streets, I will wait along with the other pedestrians to cross.

755 Q. When a long freight train is going through, generally a large crowd of people congregate on the side of the track, waiting for the cars?

A. Oh, yes, yes.

Cross-examination.

Questions by Mr. FENTON:

— Can you give me the number of cars that cross East First Street and Morrison?

A. East First and Morrison?

Q. Yes, daily.

A. Well, not right off, no.

Q. Can you approximate it and then later give me the exact number?

A. Well, on the Brooklyn Line, I will say there is sixteen per hour—that is the maximum.

Q. How many hours—sixteen hours?

A. No, not sixteen hours; that is during the heavy rush I am giving you now; that would be during the heavy rush at night. I am just giving you the largest number that cross.

Q. What I want—is the number of cars that cross East Morrison Street and First Street, going either way.

A. I could not give that to you for the eighteen hours until I see the schedule and count every trip.

Q. How long would it take you to do that?

A. Oh, it might take me half an hour when I get down to the office.

Q. Will you be good enough to do that and come back here before five?

A. Yes, yes, I can do that.

Q. I don't care for anything—you might also get the normal traffic across East First and Madison, I think it is when the Madison Street bridge is in operation.

756 A. I have nothing to do with that. I could not give that.

Q. Then, give me the traffic on East First and Morrison Street- and get back here, if you will.

Redirect examination.

Questions by Mr. BENBOW:

Q. You are familiar with the foot-passengers over the streets of the city?

A. Not any more so—

Q. I mean the condition of the streets in the City as to foot passengers.

A. Yes.

Q. Are there a great many people on the streets or a few during business hours of the day? Crossing back and forth on Washington?

A. During rush hours, of course, there are more people on the streets than during the slack part of the day. The same thing applies to the street cars and we have more street cars out during the heavy traffic.

Q. During business hours of the day, is the street, sidewalk,—very full of people, nearly congested?

A. On some streets, some corners,—yes.

Q. What corners,—what streets?

A. I would say on Washington from Third to Sixth. I should think that would be about the busiest section of the city.

Q. Morrison?

A. Morrison from around Third and Morrison up to Sixth and Morrison is pretty busy.

Q. Full of people all through the business part of the day?

A. I wouldn't say full of people. Quite a good crowd on those two streets.

757 Recross-examination.

Questions by Mr. FENTON:

Q. While you are looking, Mr. Cooper, will you also look for the traffic,—the cars across Burnside and across the steel bridge? To show the traffic, the volume of traffic across the river is what I am after.

A. Very well.

Witness excused.

758 Father I. M. VASTA, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Questions by Mr. KAVANAUGH:

—: Father, are you the pastor of the Italian Church?

A. Yes, sir.

Q. Where is that located?

A. Fourth and Main.

Q. How long have you been there?

A. I have been there for just a year. I came here, a year in this December.

Q. Is your Church across the street from St. Mary's Academy and college?

A. Yes, on Fourth Street.

Q. Have you frequently been in the academy?

A. I have been there several times, yes.

Q. The Fourth Street railway runs in front of your church, does it?

A. It does.

Q. And in front of St. Mary's Academy?

A. Yes sir,

Q. What effect has that on the services in your church there when it passes?

A. Very often, and always we have to stop the service.

Q. Until it passes?

A. Until it passes. Yes, sir, if we are preaching or reading the scriptures, or exercising the duties of our office, hearing confession, for instance, we have to stop. Impossible to hear what is said.

Q. Is there anything conducted in the basement of the church?

A. No.

Q. Where is your school there?

A. It is just in the old Blanchet Institute.

Q. Not so much in there. That is on Fifth Street?

A. Yes; to a certain extent, but it is a source of annoyance to us. It is a source of annoyance because the children come through from Fourth Street to school.

Q. You may state, if you know, what inconvenience it causes to St. Mary's Academy when the train goes along.

A. There are some, I suppose. I know this. I heard it said at times the teaching stops, that everything stops whenever a car goes up or down.

Q. Have you ever been in the class room?

A. No.

Q. You have been in the building though?

A. Oh, yes.

Q. How is the noise there?

A. Noise unbearable and the building shakes. Our church and our vestments; we have a brick building there and they shake.

Q. Is the vibration violent?

A. Yes, it is.

Q. Shake the lights?

A. Yes, sir, and windows.

Q. What effect has the smoke from the train when the windows are down?

A. It dirties them.

Cross-examination.

Questions by Mr. FENTON:

760 —. Father Vesta, when did you build that church there?
A. Well, I do not know, but I think it was put up about seven years ago.

Q. How much of a church is it?

A. I cannot answer exactly.

Q. I mean in parishioners.

A. Oh, yes, in number of people, we are six thousand belonging to our church.

Q. That includes the entire Italian colony?

A. Yes, but then, of course, they are not all Italians, that go to Church. There are Germans and there are Irish.

Q. They live anywhere in the city?

A. Yes, all over the city.

Q. Your attendance at service is about how many in number?

A. Well, all the services on Sundays most all not less than five or six hundred.

Q. Including men, women and children?

A. Yes.

Q. You haven't yourself been in the St. Mary's Academy while recitations are going on?

A. No.

Q. How long has St. Mary's Academy been there?

A. I cannot answer that question.

Q. How long have you been in the city?

A. I have been in the city about a year.

Q. Where did you come from?

A. From Lake View.

Q. Lake View, Oregon?

A. Or rather, I came from St. Ignatius Mission.

Q. St. Ignatius in Montana?

A. Yes, sir, in Montana?

761 Redirect examination.

Questions by Mr. KAVANAUGH:

—. You belong to a Jesuit order?

A. Yes, sir.

Q. And travel about a good deal?

A. Yes, sir.

Witness excused.

762 D. T. HUNT, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. KAVANAUGH:

— Where do you reside, Mr. Hunt?

A. On Fourth Street between College and Lincoln,—right in the bend there.

Q. How long have you been there?

A. Since, I think it is April, of 1905.

Q. Does the Fourth Street car line pass in front of your residence?

A. Yes, sir.

Q. What effect has the running of cars and locomotives on that line on your residence?

A. Well, it causes it to rock quite a bit at times, and the smoke in the summer time is particularly disagreeable from their engines.

Q. Is there any vibration, rocking?

A. Yes, sir, just as I said, quite a bit of rocking at times; that is caused entirely by the length and weight of its trains.

Q. What about the noise being considerable?

A. Well, I should say in that case, while the noise is there, it is like everything else when you become used to it you don't notice it, to any great extent.

Q. What effect has the vibration on the building in which you live?

By Mr. FENTON: You mean the rocking?

763 Mr. KAVANAUGH: Yes.

Mr. FENTON: He said the residence rocks.

A. The greatest trouble we have had is with our gas mantels. I rocks it to such an extent that the mantels go to pieces very quickly.

Q. Does it shake your fixtures in any other way, loosen them up?

A. You can hear the globes rattle, but it doesn't hurt the fixture any.

Q. Does it destroy the mantels?

A. Oh, yes.

Q. Is that frequent?

A. Well, I would say that a 35 cent mantel will generally go to pieces in something like ten days.

Q. How long would they last if no vibration,—or ordinarily?

By Mr. FENTON: If he knows.

Q. If you know.

A. That is something I am not in position to state, but of course quite a long time.

Q. You can see them shake?

A. You know those things have more or less asbestos or something of that kind in them. After it is burnt it takes out the elasticity there is there and they do not stand shaking.

Q. You find that a desirable place to live with relation to the road?

A. No, sir.

764 Q. You expect to continue living there, do you?

A. No, sir, I do not.

Q. Why do you expect to move?

A. Two reasons for that. In the first place we are about to accomplish what we have waited for a long time, to be able to build a home. We possibly wouldn't move so quick if it hadn't been for this disagreeable feature of living on that railroad.

Cross-examination.

Questions by Mr. FENTON:

— How long have you lived there?

A. Since April, 1905, sir.

Q. Do you live in a rented house?

A. Yes, sir.

Q. What rent do you pay?

A. Twenty-six dollars.

Q. What size of house is it?

A. A five room flat, sir.

Q. Who owns it?

A. J. W. Curran.

Q. Built new was it?

A. Oh, no, sir.

Q. How long has it been built probably?

A. Why I would imagine possibly eight or ten years, *with* without knowing.

Q. Is the entire neighborhood built up with residences? Practically covering all the ground adjoining the street on both sides?

A. Yes, sir.

765 Q. A good many new residences in that section the last two or three years?

A. No, sir, the only new residence there is the flat that sets this side of us,—that is, north of us, built by Mr. Farmer there two or three years ago.

Q. How much of a flat is that?

A. That has six compartments in it.

Q. All the other space along there in that vicinity is covered by residences that have been built a good many years?

A. Yes, sir; are all old houses.

Q. But occupied?

A. Yes, sir.

Q. No vacant houses along there, are there?

A. No, sir, if there are any they do not stand vacant long.

Q. Fill right up?

A. Fill right up.

Q. Rents there are about the same as for the same character of houses in similar neighborhoods, or cheaper on account of close in?

A. I would imagine the rents there to compare favorably with rents in other parts of town the same distance,—downtown distance.

Q. You said this house here rocked? You don't mean the house rocks like a cradle?

A. It reminds you of that sometimes, if you are in bed.

Q. You do not mean to say—have you ever been in an earthquake?

A. Yes, sir.

Q. And been awakened with an earthquake motion?

A. Yes, sir.

Q. Now, you don't mean to say that that is the way this vibration or rocking is?

A. No, I say it reminds you that you might be rocking.

766 Q. Yes, but you are not?

A. I tell you;—there is one thing there about that particular house that we are in,—Why it is on a fill and an old fill and that possibly may have something to do with it. It is not solid ground.

Q. So you have a house there that is not very well supported on the foundations?

A. It is supported all right, but I imagine from what people say,—it was before my time—but they tell me that before the street there was filled on this same fill—

Q. It is filled ground?

A. Yes, sir, has been for a number of years.

Q. That probably has caused the unusual vibration.

A. Helps some and we are right on the bend too.

Q. On the curve?

A. Yes, sir.

Q. Between Lincoln—

A. And College.

Q. And College. Which side of the street?

A. East side.

Q. What number?

A. 546½.

Q. And you mean to be understood as saying that there is an unusual amount of vibration in the house when the trains go by?

A. Well, there is quite a bit of it; it varies at times, owing to the length and weight of the train.

Q. You don't mean to say that the house moves that way, like that window curtain?

A. I expect you could discover some of that motion if you could get a glass there.

Q. But you would have to use an instrument like they use to measure—

767 A. Yes.

Q. Earthquakes to tell?

A. Yes, it doesn't rock enough to discover just with the naked eye.

Q. You feel a motion, though, a tremble?

A. Yes, sir, and that causes fixtures to rattle.

Q. Let me ask you if you had any experience with mantels in any other residence in the city.

A. Yes, sir.

Q. Have you used them in any other residence?

A. Yes, sir.

Q. The ordinary mantel?

A. Yes, the ordinary mantel.

Q. Same kind that you used up there?

A. Yes, sir.

Q. But you have never compared to see how much longer they would last than those you have in your house?

A. Not by actual time, no, sir.

Q. Those are very delicate things those mantels, are they not?

A. Very delicate after once lighted.

Q. If your fixtures are suspended from the wall down, and are not bracket fixtures or solid fixtures when you turn the light on or jar your fixtures it would shake your mantel, would it not?

A. There is some motion to any fixture when you turn the light on.

Q. You use the electric lighting appliances to turn the gas?

A. No. No, it is just regular, just like that fixture there; just the regular gas fixture.

Q. And your mantels?

A. Stand up.

768 Q. Stand up. But not heavy fixtures like that?

A. No.

Q. Light house fixtures,—five room house?

A. Yes.

Q. Ordinary movement of that fixture would jostle that mantel some, wouldn't it?

A. Yes, sir.

Q. You know, as a matter of fact, those mantels do not last more than three weeks in these ordinary houses after they are burned?

A. A good mantel should.

Q. But they don't as a matter of fact, as supplied in this market?

A. We sell mantels ourselves.

Q. I mean the mantels ordinarily furnished to the trade here do not last over three weeks in an ordinary home in this city if they are used, do they?

A. I would be very much disappointed to feel that mantels would not last longer than that.

Redirect examination.

Questions by Mr. KAVANAUGH:

— Are you in the mantel business?

A. No, sir, but we sell them, in connection with our general jobbing and repairing business you know.

Q. Do mantels in your house last as long as they should last ordinarily?

A. I have not thought so.

Witness excused.

Defense rests.

769 Mr. FENTON: I wish to say, in view of the great volume of documentary evidence offered, and the technical requirements, I am under to prove from these allegations that have been denied, I should like to have your consent to stand open until I have had it extended, and if in the record I have omitted any of the chain of title, I should like to have the privilege to submit it.

Court: Certainly, and the same to the defense.

770 L. R. FIELDS, recalled by complainant, in rebuttal, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Fields, you have been sworn. I would like to have you state to the Court the number of freight trains and passenger trains operated by the Southern Pacific Company out of the Union Depot and over East First Street on the main line of the Oregon and California Railroad company daily.

By Mr. KAVANAUGH: Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Exception taken.

A. There is twelve regular passenger trains: Four regular freight trains; there is 10 light engines without trains and an average of four extra trains.

Q. Extra freight?

A. Extra freight and extra passenger, and a movement of twenty-five switch engines in the twenty-four hours over East Morrison and East First Street.

Q. And are these crossings all at grade?

A. All at grade, yes, sir.

Q. Now, about what number of trains move over the Northern Pacific Railway at the Union Depot per day?

By Mr. KAVANAUGH: Same objection.

Objection overruled.

Exception taken.

A. I should say about twelve trains in the twenty-four hours N. P.

771 Q. About what number of trains move into the Union Depot on the Oregon Railroad & Navigation Company per day?

By Mr. KAVANAUGH: Same objection.

(Objection overruled.)

(Exception taken.)

A. About twelve trains.

Q. About what number of trains of the Astoria & Columbia River Railroad Company move into the Union Depot over the tracks from Astoria to Portland per day?

By Mr. KAVANAUGH: Same objection.

(Objection overruled.)

(Exception taken.)

A. Ten trains.

Q. About how many trains move over the North Bank, moved or operated by the Portland Seattle & Spokane Railroad, commonly known as the North Bank, into their terminals West of the Union Depot?

By Mr. KAVANAUGH: Same objection.

(Objection overruled.)

(Exception taken.)

A. About eight trains in twenty-four hours.

Q. State what the fact is as to where all these trains with their business, both freight and passenger traffic, make their delivery and are made up to take the business out. At what point in the city with reference to the North end of Fourth Street.

A. All of the freight and passengers going out and arriving on the Southern Pacific, O. R. & N., Northern Pacific, and Astoria and Columbia River Railroad, at the Union Depot, or the Northern Pacific Terminal Company. The Spokane Portland and
772 Seattle, at their depot North of the Terminal Company's ground.

Q. Do you know, Mr. Fields the length of the new mileage from the intersection of the Beaverton-Willsburg cut-off with the West Side division over to the connection with the East side main line. Do you know the length or miles?

A. Approximately fifteen miles.

Q. That is, of new mileage?

A. That is of new mileage.

Q. Then, what is the distance from the intersection near Milwaukee into the Union Depot?

A. About four miles?

Q. Then the construction and operation of that cut-off would require the company as to the Fourth Street business to operate what additional and increased mileage beyond what it now operates; that is, how much longer would the haul be approximately?

A. It would be about ten miles.

Cross-examination.

Questions by Mr. KAVANAUGH:

— On First and East Morrison Street, Mr. Fields, you have gates to protect the public, haven't you?

A. Yes, sir.

Q. And is that true of First and Hawthorne?

A. Yes, sir.

Q. Is that true of—Burnside bridge runs over the tracks?

A. Burnside runs over.

Q. Steel bridge runs over?

A. Yes, sir.

Q. These are the only grade crossings from the bridges,—I mean direct from the bridges?

773 A. No, sir. There is East Fifth Street or Grand Avenue, that is a grade crossing. A good deal of travel over that,—street cars?

Q. Where is that crossing,—near Inman-Poulsen's mill?

A. This side of Inman-Poulsen's Mill about three blocks from Hawthorne Avenue.

Q. Isn't there a flag system there for the street car line?

A. The conductors flag the car. We have no flagging though.

Q. What is the grade of East First Street from the time you leave the Steel Bridge until you come up to Grand Avenue?

A. From the time you leave the Steel Bridge to Hawthorne Avenue it is practically level; from Hawthorne Avenue to Grand Avenue a grade very probably 25 feet to the mile.

Q. A good deal easier grade than Fourth Street?

A. Oh, certainly.

Q. How wide a right of way have you on East First Street, do you remember?

A. Well, I think the street is about 60 feet in width, and we have two tracks. We have a double track from Oak—East Oak Street to East Madison Street, and then in addition to that is the side tracks for the several industries along there.

Q. Do you have a right of way for a double track there along East First Street?

A. Yes, sir.

Q. How long is your private right of way after you leave Grand Avenue going South?

A. Well, it is from thirty—it is from forty to twenty feet.

Q. Haven't you as high as 100 feet up there at some points?

A. No, sir, no place this side the car shops.

Q. If you were shipping freight from the west side division across the Oswego cut-off, that is, freight that was going on through
774 to the East, you would run it on into the Terminal yards, or if it was going on the O. R. & N. would you transfer to East Portland?

A. I would transfer to East Portland. That is, I will qualify that. I will say if it was going East over the O. R. & N. If going East over the N. P., it would be brought over to the Portland Terminal.

Q. What road is that that is digging a tunnel down on the peninsula?

A. Oregon and Washington.

Q. That will go in on the East side too, will it not?

A. That is my understanding.

Redirect examination.

Questions by Mr. FENTON:

— The Oregon and Washington is the corporation building by the Harriman interests from Portland to Seattle?

A. Yes, sir.

Q. And that tunnel referred to is the tunnel to go through the peninsula to the bridge across the Columbia River, is it?

A. Yes, sir, to the bridge of the Spokane, Portland & Seattle.

Q. Where does this tunnel come out, with reference to the Willamette River?

A. This side of St. John; that is North—or Rather South of St. John.

Q. At that point it will intersect with the Troutdale extension of the O. R. & N.?

A. Yes, sir.

775 Q. This won't come into the city?

A. Through the O. R. N. through Albina.

Q. Over the new bridge?

A. Over the new bridge.

Q. That bridge will be where?

A. At Oregon Street on the east side.

Q. Where on the west side?

A. Glisan Street on the west side; Glisan and Third.

Q. And where with reference to the north end of Fourth Street?

A. Well, it will—I will say at Glisan Street, the upper approach will end at Glisan Street, the Portland side, but the lower approach will come in about the end of Third Street—foot of Third Street, near where the Northern Pacific Terminal Company's roundhouse is at the present time.

Q. On the grounds of the Northern Pacific Terminal Company?

A. On the grounds of the Northern Pacific Terminal Company.

Q. And meet the traffic that comes by Fourth Street on those grounds?

A. Yes, sir.

Witness excused.

776 Mr. FENTON: I offer the title page of the revised ordinances of the City of Portland, Oregon, published January, 1905, which reads as follows:

"The general ordinances of the City of Portland, Oregon, in force January 2, 1905, compiled and arranged by Thomas C. Devlin, Auditor of the City of Portland, Oregon, by authority of the Common Council of the City of Portland, Oregon, 1905."

Mr. KAVANAUGH: I object to the title page. It amounts to nothing.

Mr. FENTON: You do not question this is the official compilation of the City of Portland?

Mr. KAVANAUGH: I know there are mistakes in there. It was made under order and never approved except by the Auditor himself. I know of a great many errors in it.

Mr. FENTON: I am not offering it to show errors. I am offering it to show authorization.

Mr. KAVANAUGH: I understand it never was adopted. He was simply authorized to compile them and he did compile them. I may be mistaken about it.

Mr. FENTON: Well, I will offer it for what it is worth.

COURT: Very well, for what it is worth.

Marked Complainant's Exhibit "MM".

777 Mr. FENTON: I offer Ordinance No. 183, found at pages 23 and 24 of this compilation, and I want to offer this for the purpose of showing how the City of Portland, by its officials, have treated this franchise, and I offer particularly these words: "Franchise owned by the Oregon and California Railroad Company, leased by the Southern Pacific Company."

Mr. KAVANAUGH: I object to that because I know that part was not authorized.

The COURT: You mean not in the Ordinance?

Mr. KAVANAUGH: Not in the original ordinance.

The COURT: Very well.

Mr. FENTON: I offer the original, and certified copy of that Ordinance, and ask time to submit.

Ordinance No. 183, marked Complainant's Exhibit "NN".

778

Ordinance No. 183.

(Former City of East Portland.)

*(Franchise Owned by the Oregon & California Railroad Company,
Leased by the Southern Pacific Company.)*

*An Ordinance Granting to the Oregon and California Railroad
Company the Right of Way on First Street.*

(Preamble.)

Whereas, by the consent and approbation of the Board of Trustees of the City of East Portland, the Oregon and California Railroad Company has heretofore, at large cost and expense, graded and erected a roadbed and trackway upon which to lay the rails for and to operate its line of railroad within, upon, and along First Street, in said city, from the center line of "A" street to the center line of "V" street, and thence crossing certain streets in said city, to the boundary line thereof on the south, with the expectation on the part of the officers of said railroad company, induced by the Board of Trustees of said city, that said privilege, upon proper terms and conditions, would be perpetuated by said city, to said railroad company; now, therefore,

The City of East Portland does ordain as follows:

(Franchise—Conditions of.)

SECTION 1. The Oregon and California Railroad Company is hereby authorized and permitted to continue, construct, maintain, use, improve, and keep in repair its railroad track upon, and to occupy for the purpose of its said railroad track, so much of said First Street in the city of East Portland, between the center line of "A" Street and the north line of "J" Street, as shall be necessary

and sufficient to place, maintain upon and use three parallel railroad tracks in the same manner as such tracks are now constructed and used upon a portion of said First street; and the said Oregon and California Railroad Company is hereby authorized and permitted to continue to use all that portion of First street between the North line of "J" street and the south line of "V" street, in said City of East Portland, for its railroad track as hereinafter mentioned; and to construct, maintain, keep in repair, and use for railroad purposes, two parallel railroad tracks over all said last mentioned portion of First street, and to occupy and use so much of said First street as shall be necessary for that purpose; but said railroad track shall not occupy a space of more than twenty feet in width along said street, which shall be included between two lines ten feet on either side from the center line thereof; and also, to continue, maintain, keep in repair, and use its railroad for railroad purposes across any and all streets in said city over which the same is now constructed between said "V" street and the south boundary line of the city.

(Company to Improve When Ordered by City—What.)

SECTION 2. All alterations of grades of streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of said railroad company, and the same shall be made as may be provided by ordinance and whenever any of said streets, any portion of which shall be used or occupied by said railroad company under this Ordinance for its railroad track, shall be ordered improved by the said city by laying plank roadway for the full width of such street, and laying sidewalks in the manner provided in its charter, the said railroad company shall improve and thereafter maintain in repair in the manner provided for the improvement of such streets, and at its own expense, so much thereof as shall be embraced between its said track and the outside ends of the ties of its roadbed.

780 Change of Grade of Roadbed to be at Expense of Company.

And in case the grade of any of such streets shall be hereafter changed by said city in the manner provided in its charter, the grade of the road of said company shall be changed by said company at its own expense, to conform to such changed grade.

Rate of Speed.

SECTION 3. The said railroad company shall not run its locomotives or railway cars upon or over any such streets at a greater speed than ten miles an hour.

Passed June 17, 1876.

A. J. HOYT,
President of the Board of Trustees
of the City of East Portland.

781 Mr. FENTON: I offer Ordinance No. 599, as printed on pages 24 and 25 of this volume, and particularly these words: "Railroad franchise owned by The Oregon and California Railroad Company, leased by the Southern Pacific Company". And I ask leave, Your Honor, to submit a certified copy of the original ordinance as first presented, if I can find it. Mr. Goutz is now looking for this, 599.

Ordinance No. 599, marked Complainant's Exhibit "OO".

782 Mr. FENTON: I offer in evidence Ordinance No. 3656, with reference to tracks in the North part of the City in connection with the Northern Pacific Terminal Company and the Oregon and California Railroad Company.

Marked Complainant's Exhibit "PP".

783

Ordinance No. 3656.

(Railroad Franchise Owned by The Northern Pacific Terminal Company.)

An Ordinance authorizing the Northern Pacific Terminal Company of Oregon, its successors and assigns, to construct and maintain a double railway track in North Front Street, in the City of Portland, from the northern limits of said city to the south line of P street, and a single track from thence to a point opposite the southwest corner of block G and eighty feet distant therefrom with a side track from a point opposite block 220 to Block H, both in Couch's Addition to said City of Portland; also sufficient and suitable side tracks from, at or near the foot of P street curving across and along East and West Park streets and M, N, O and P streets, and to confirm to the Oregon and California Railway Company the right to maintain and operate its main and side tracks in north Front Street in said City.

The City of Portland does ordain as follows:

(Franchise-Route.)

SECTION 1. The Northern Pacific Terminal Company of Oregon, its successors or assigns are hereby authorized and permitted to construct and maintain a double railroad track along north Front street in the City of Portland the center line of each track to be located seven (7) feet from and on either side of the center line of said street from the northern boundary line of said city to a point of intersection with the south line of P street in Couch's addition to said city, produced and a single track from thence to a point opposite the southeast corner of Block G in said Couch's Addition

784 with its center eighty feet in an easterly direction therefrom.

And also a side track from a point in said main track opposite the southeast corner of fractional block 222 in said Couch's Addition to a point at or near the northwest corner of fractional Block

H in said Couch's Addition, with a branch track from a point in said side track near the southeast corner of Block 221 in said Couch's Addition to a point in the west line of said block H about forty feet from the northwest corner thereof.

And also the right to construct and maintain sufficient and suitable side tracks, branches and turnouts, branching off from said double track in North Front Street between the West line of North Eighth Street extended, and the west line of east Park Street extended, thence along and across East Park Street and West Park Street and "M", "N", "O" and "P" Streets as nearly as practicable as said main and side tracks are now shown and designated upon an annexed map or plat by red lines, which plat is made a part hereof and to run locomotives and cars over the same upon the terms and conditions herein provided.

The Northern Pacific Terminal Company, in the exercise of the rights and privileges hereby granted shall not construct any of its main or side tracks in or along North Front Street East of the East line of East Park Street extended, unless, or until it shall have agreed with the Oregon and California Railway Company for the purchase or leasing of the property of said Oregon and California Railroad Company, situate on either side of said Front Street for terminal purposes and for the occupation and use by the said Oregon and California Railroad Company in common with other railroad and transportation companies of the terminal facilities

785 to be provided by the said Northern Pacific Terminal Company. And the said Oregon and California Railroad Company, its successors and assigns, is hereby authorized to maintain and operate for the purpose of a railroad operated by steam, its main and side tracks as now located, constructed, and used in said North Front Street until such time as the Northern Pacific Terminal Company shall have constructed and completed its terminal buildings and railroad tracks, and shall have by agreement with the said Oregon and California Railroad Company extended its tracks upon North Front Street south of the East Line of East Park Street.

The right hereby granted may be exercised and said tracks, branches, turn-outs, and side tracks may be constructed and maintained by the said Northern Pacific Terminal Company, its successors and assigns, for the use of the Northern Pacific Railroad Company, the Oregon Railway and Navigation Company, the Oregon and California Railroad Company, the Oregon Improvement Company, the Oregon and Transcontinental Company, the Oregonian Railway Company, Ltd., the Pacific Coast Steamship Company, and any other Railroad or transportation companies to whom the right to use the terminal buildings and facilities may be leased by the Northern Pacific Terminal Company.

(Company to Improve—What.)

SECTION 2. The said Northern Pacific Terminal Company shall grade to the established grades, construct, and maintain in good repair the following enumerated portions of said streets so occupied:

First, between its double tracks from the northern boundary of the city limits to the south boundary line of P Street extended.

786 Second, between the rails of all its main and side tracks and branches.

Third, at least two feet in width upon each side of the outer rail of all its main, side tracks, and branches. And shall do and perform such work and improvement and repair of said portions of said street in such manner and as often as the Common Council of the City of Portland may provide for or require.

(Alterations at Expense of Company.)

SECTION 3. Alterations of grades of streets required for laying the said railway tracks and all improvements and repairs of the same for said purpose, shall be made at the expense of said Northern Pacific Terminal Company, and the same shall be made as shall be provided by ordinance.

(Rate of Speed.)

SECTION 4. The Common Council of the City of Portland reserves the right to regulate by ordinance the rate of speed at which locomotives and trains may be run upon said track.

Passed the common Council December 6, 1882.

Approved December 8, 1882.

J. A. CHAPMAN, *Mayor*.

787 Mr. FENTON: I offer Ordinance No. 8099, in favor of the Oregon & California Railroad Company for the side track on Fourth Street.

Mr. KAVANAUGH: Objected to as immaterial.

Objection overruled; exception saved.

Ordinance No. 8099 marked Complainant's Ex. QQ.

Ordinance No. 8099.

An Ordinance Authorizing the Oregon & California Railroad Company to Place a Side Track on Fourth Street, in the City of Portland, for the Accommodation of the Union Meat Company.

The City of Portland does ordain as follows:

Franchise—Routes.

Sec. 1. That the right and privilege is hereby granted to the Oregon and California Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon to lay, maintain and operate a sidetrack of standard gauge to connect with the main track of the said Oregon and California

Railroad Company at a point about ten (10) feet north of the north line of Hoyt street, branching off from said point toward the west or south of the center line of Fourth Street, and running by curves customary for railroad sidetracks until it reaches a point twenty-three (23) feet west of the center line of the said Fourth Street in front of Block P in Couch's Addition to the City of Portland, and running thence south along said Fourth Street and twenty-three (23) feet west of said center line of Fourth Street until it reaches the north line of Glisan Street. Said track shall be laid and maintained flush with the established grade of said Fourth street.

Operation of Cars—Under Control of City.

SEC. 2. The operation of cars over the track hereinbefore provided shall be under the direction of the Committee on Streets and the Superintendent of Streets of said city of Portland and said City of Portland reserves the right to cause the said Oregon and California Railroad Company to remove said track and place the street in as good condition as it was at the time before said track was built when the Common Council shall so order.

Acceptance.

SEC. 3. A written acceptance of the terms of this ordinance and an agreement coupled therewith to remove at its own expense all said tracks when required by said Common Council shall be filed by the said Oregon and California Railroad Company with the Auditor and Clerk of said City before laying any track mentioned in this ordinance and within thirty (30) days after the approval thereof.

Street Improvements—To Make.

SEC. 4. The said railroad company shall grade to the established grade and plank, pave or macadamize and maintain in good repair that portion of the street or sidewalk occupied by said track at least six (6) feet each side of the center line thereof, and shall do and perform said work and the improvement and the repair thereof in such manner and as often as the Common Council of the city of Portland may at any time provide for or require.

789

Forfeiture.

SEC. 5. The failure to lay the track hereinbefore provided for within six (6) months from the date of the passage of this ordinance shall at once and without any act of said city work a forfeiture of all rights and privileges conferred by this ordinance.

Approved January 5th, 1893.

790

Mr. FENTON: I Offer Ordinance No. 13183, Oregon and California Railroad Company, with reference to side track on Fourth Street, and ask leave to put in certified copy.

Ordinance 13183 marked Complainant's Exhibit "RR."

791 Mr. KAVANAUGH: To all of this I would like to offer a separate objection to each one on the ground that this is not rebuttal testimony. It should have been testimony in chief before we closed the case. It should have been testimony that we could meet.

Mr. FENTON: Then I ask leave that it may be offered in chief.

Mr. KAVANAUGH: Will we be permitted to rebut that testimony?

The COURT: Yes, sir.

Mr. KAVANAUGH: And further, on the ground that it is immaterial.

The COURT: I understand that all this record goes in under your objection as immaterial.

Mr. FENTON: I will offer Section Four of the explanatory note in the Charter of the City of Portland—preceding the Charter of the City of Portland now in effect. What is the date of that, Mr. Kavanaugh?

Mr. KAVANAUGH: January 23, '03, that is the previous charter. That forms no part of the Charter, it was eliminated.

Mr. FENTON: This was submitted to the voters and that is what they voted on.

Mr. KAVANAUGH: They didn't vote on the foreword. They voted on the Charter. That is not in the original Charter.

792 Mr. FENTON: It accompanied it when submitted.

I offer it as a part of the history of the adoption of this Charter. Section 4.

Marked Complainant's Exhibit "SS."

Section Four of the Explanatory Note.

"4. To Regulate the power to grant franchises and to provide for the acquirement by the city of Public Utilities.

In the past, Portland, like all cities of the United States, has lightly valued its rights and privileges. The proposed charter provides that in future no franchise shall be granted for more than 25 years now without a fair compensation to the city. In Addition should the people so demand at an election held for that purpose and with careful limitations upon increase of indebtedness, the city may assume any public utility; i. e., to take over lighting plants, telephone systems, street railways and the like."

By Mr. FENTON: I offer what appears under franchises in the parallel columns on page 10, which reads:

Marked Complainant's Exhibit "TT."

"Franchises.

No restrictions on Council's Powers to grant any kind of a franchise for any length of time.

"Franchises.

Council cannot grant a franchise for more than 25 years, nor without fair compensation to the city. Before its final passage, an ordinance granting a franchise must be published at the expense of the applicant in the city official newspaper, and must receive the affirmative vote of two-thirds of council to become valid. Sections 93 to 112."

793 Mr. FENTON: I offer Section 7, Liability under previous contracts: "All contracts of every description heretofore duly and legally made and entered into by the said City of Portland shall remain valid and be binding upon this municipality to the extent only that they are now valid and binding upon said City of Portland."

Mr. KAVANAUGH: It is pleaded in your complaint.

Mr. FENTON: I am introducing this to get it into the record.

Mr. KAVANAUGH: This is the general law, and the Court takes judicial knowledge.

Mr. FENTON: There is some question about that.

COURT: Let him read it into the record, and there will be no question.

Section 7 of Charter Marked Complainant's Exhibit "UU."

Mr. FENTON: I will offer Section 95. This is a long section, and I will ask the Reporter to make it.

Section 95 of the Charter marked Complainant's Exhibit "VV."

"SEC. 95. No franchise, lease or right to use the water front, ferries, wharf property, land under water, public landings, wharves, docks, highways, bridges, avenues, streets, alleys, lanes, parks or any other public place, either on, through, across, under or over the same, nor other franchise, shall be granted by the city to any private corporation, association or individual except as in this Charter otherwise provided, for a longer period than twenty-five (25) years,

794 nor without fair compensation to the city therefor, and in addition to the other forms of compensation to be therein provided the grantee may be required to pay annually to the city such percentage of the gross receipts arising from the use of such franchise and of the plant used therewith as may be fixed in the grant of said franchise. Every grant of a franchise shall fix the amount and manner of the payment of the compensation to be paid by the grantee for the use of the same and no other compensation of any kind shall be exacted for such use during the life of the franchise, but this provision shall not exempt the grantee from any lawful taxation upon his or its property, nor from any licenses, charges or impositions not levied on account of such use. Every grant of a franchise or right and every contract therefor made or granted under the provisions of this Charter shall provide that at the expiration of the term or period for which it is made or granted the city at its election and upon the payment therefor of a fair valuation thereof to be made in the manner provided for therefor in the grant or contract may purchase and take over to itself the property

and plant of the grantee in its entirety and which may be situated on, in, above or under the streets and public places aforesaid or any thereof and used in connection therewith, but in no case shall the value of the franchise of the grantee be considered or taken into account in fixing such valuation or such grant and contract in pursuance thereof may provide that upon the termination of said franchise, or right, granted by the city, the plant as well as the property, if any, of the grantee situated on, in, above or under the public places aforesaid and used in connection therewith shall thereupon be and become the property of the city without any compensation to the grantee, upon an ordinance duly enacted authorizing the same and upon its paying to the grantee said valuation; provided, however, that before the city shall have authority to take over such plant or property, the question whether or not the city shall acquire or take such plant and property shall first be submitted to the voters of the city in accordance with and subject to the foregoing limitations of this Article; and provided further, that the question whether or not the city shall acquire or take such plant or property must be submitted to the voters of the city as above provided without such ordinance, whenever a petition shall be filed with the Council subscribed by a number of electors of the city equal to 15 per centum of the votes cast at the last preceding election, asking that such question shall be submitted for approval or rejection to the vote of the people. Such ordinance must be passed or such petition filed within one year prior to the expiration of such grant or franchise and within a sufficient time before the expiration of such year so that if a special election is required to be held to pass upon such question, the same can be held within six months prior to such expiration. Such petition shall be sufficient if it conforms to the requirements of sections 53 and 54 of this Charter as to the petition therein provided for. Every grant reserving to the city the right to acquire the plant as well as the property, if any, of the grantee situated in, on, above or under the streets, avenues, or other public places of the city shall in terms specify the method of arriving at the valuation therein provided for and shall further provide that upon the payment by the city of such valuation the plant and property so valued, purchased and paid for shall become the property of the city by virtue of the grant and payment thereunder and without the execution of any instruments of conveyance and every such grant shall make adequate provision by way of forfeiture of the grant, or otherwise, for the effectual securing of efficient service and for the continued maintenance of the property in good order and repair throughout the entire term of the grant; but the terms of this section so far as they relate to the acquisition of the plant, property and business of the grantee shall not apply to the rights given railroads under sections 102 and 103 of this Charter."

Mr. FENTON: I think the others are pleaded, Your Honor; it is offered for the respective purpose of showing the difference between the present charter and the State Law in effect at the time Ordinance No. 599 was passed.

That is all, Your Honor, excepting the introduction of that map by the City Engineer which may have to be identified.

Mr. KAVANAUGH: Does Your Honor believe there is any question about the Court taking judicial notice of the provisions of the charter?

The COURT: I do not know what the rule is on the subject.

Mr. KAVANAUGH: If there is any doubt, I would like to introduce some provisions here that we want to rely upon.

Mr. FENTON: The only question is in preserving the record for appeal; we have it in the record.

797 Mr. KAVANAUGH: I will introduce Section 73, Subdivisions one and two.

Section 73 of the Charter of the City of Portland, marked Defendant's Exhibit No. 8.

"SECTION 73. The Council has power and authority, subject to the provisions, limitations and restrictions in this Charter contained:

1. To exercise within the limits of the City of Portland all the powers commonly known as the police power to the same extent as the State of Oregon has or could exercise said power within said limits.

2. To make and enforce within the limits of the city all necessary water, local, police and sanitary laws and regulations."

Mr. KAVANAUGH: I will introduce Section 74.

Section 74 of the Charter of the City of Portland, marked Defendant's Exhibit No. 9.

"SECTION 74. The foregoing or other enumeration of particular powers granted to the Council in this Charter shall not be construed to impair any general grant of power herein contained nor to limit any such general grant to powers of the same class or classes as those so enumerated."

Mr. KAVANAUGH: Ordinance No. 599 is in.

798 Mr. FENTON: Yes, that is in with this difference, Mr. Kavanaugh. I am trying to find the original ordinance and the original record of the ordinance for the purpose of determining whether they are exactly as printed in this book.

Mr. KAVANAUGH: There may be a few more sections and Mr. Fenton may have a few more.

The COURT: We will leave the record open and you can read into it whatever you want.

Mr. FENTON: I offer the Act of Congress of May 4, 1870.

Marked Complainant's Exhibit "WW."

799 An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That for the

purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption of homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

SEC. 2. And be it further enacted, That the Commissioner
800 of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: And provided also, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

SEC. 3. And be it further enacted That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed (completed) sections.

SEC. 4. And be it further enacted, That the said alternate sections of land granted by this act, excepting only such as are neces-

801 sary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

SEC. 5. And be it further enacted, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side-tracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semiannually in coin not exceeding the (rate) of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the District Court of the United States, concurrently with the State courts shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

802 SEC. 6. And be it further enacted, That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date.

Approved, May 4, 1870.

803 F. COOPER resumed the stand on behalf Complainant.

Direct examination.

Questions by Mr. FENTON:

— What number of cars of the Portland Railway Light and Power Company move daily along East First and Morrison Streets in this city at the present time?

A. 1796.

Q. Does that include—1796,—what traffic does that include?

A. Well, that takes in all the lines operating over the Morrison Street Bridge, Mount Tabor, Sunnyside, Montavilla and East Ankeny, Woodstock, Brooklyn and the O. W. P. Transfer cars.

Q. And Richmond also?

A. Yes, Woodstock and Richmond.

Q. What is the traffic across the Burnside Street Bridge—crossing per day?

A. 1020.

Q. 1020?

A. 1020.

Q. What is the traffic over the steel bridge?

A. That is the steel bridge I gave you.

Q. I said Burnside.

A. Burnside is 950.

Q. Now, what lines supply that traffic over Burnside?

A. Over Burnside Bridge? Vancouver, Woodlawn, Alberta, Broadway and East Burnside Street.

Q. Now, what is the traffic over the steel bridge per day?

A. 1020.

804 Q. Where does that traffic come from?

A. St. Johns, Williams Avenue, Mississippi Avenue, and Irvington.

Q. Does any of this traffic that crosses over the Morrison Street Bridge, the Burnside Street Bridge and the Steel Bridge pass in cars over Fourth Street, and if so, at what points and about what per cent. of it?

A. On what? Give me the question again.

(Question read.)

A. Over Burnside and Morrison, yes; over the steel bridge, no.

Q. Now what percentage of the traffic over the Burnside passes over Fourth Street in cars?

A. Well, there are 645 cars per day that pass over Fourth and Burnside.

Q. Out of this traffic?

A. Out of this traffic.

Q. And what per cent. of the traffic over the Morrison Street Bridge passes over Fourth and Morrison?

A. Over Morrison Bridge? 236.

Q. The total of that traffic over the Morrison Street Bridge was how much?

A. Morrison Street Bridge is 1796.

Q. And 236 cars of that passed over Fourth Street?

A. Yes, the Mount Tabor cars only.

The COURT: Mr. Cooper, do you say that 645 cars that pass over the Burnside Bridge continue on over Fourth Street?

A. Yes, sir.

The COURT: All the cars that pass over Burnside Bridge
805 then, go across Fourth Street.

Q. Don't some go up First and Second?

A. Go up to Fourth Street. They only go one way; at Fourth and Burnside Street.

Mr. KAVANAUGH: Across Fourth Street, Mr. Cooper?

A. Yes, once at Washington and once at Fourth. While Burnside Bridge crossings are 950, 645 of these cars cross at Fourth and Burnside.

COURT: When you were on the stand before, you said 645 cars cross Fourth and Burnside. These are the cars that go over Burnside Bridge and go back?

A. Yes.

Mr. FENTON: Yes, loaded.

Q. Yes, some cars come loaded at Fourth and Washington going west and turn at Fourth and Washington going east empty?

A. Going empty in the morning and empty at night.

Q. Do you include that 645 in the number you say cross Washington Street?

A. No.

Q. 1700 cars cross Washington Street, Fourth and Washington?

A. Other lines are included in that.

COURT: You said on the first statement 1105 cars.

A. Fourth and Washington—

27 Vancouver

148 Woodlawn

145 Alberta

806 85 Broadway,

70 St. John,

20 Union Avenue

360 Twenty-third Street

250 Portland Heights.

These are the cars crossing going either or in any direction.

Mr. KAVANAUGH: What cars cross Burnside Bridge that do not cross Fourth Street?

A. What cars cross Burnside Bridge that do not cross Fourth Street?

Q. Yes.

A. Not any.

Mr. KAVANAUGH: It seems to me you gave the number crossing Burnside as higher than crossing Fourth. Didn't you say 900 Burnside and 600 crossing Fourth?

A. 950 Burnside Bridge.

Q. How many cross Fourth Street?

A. 645.

Q. Don't they all cross?

A. Those crossing Burnside is going both ways—Fourth and Burnside is only going one way.

Mr. FENTON: They cross Fourth too?

A. You have to change that at Fourth and Washington; they are included going back on Fourth and Washington.

Q. Every car that crosses Burnside Street Bridge crosses Fourth Street as many times as it crosses the bridge.

Witness excused.

807 PORTLAND, OREGON, FRIDAY, December 24/'09—

10 o'clock a. m.

S. GRUTZE recalled on behalf of plaintiff.

Questions by Mr. FENTON:

— I show you certified copy of bill of Schwab Brothers, for \$982.00, rendered April 17, 1902, against the City of Portland, which may be identified as Plaintiff's Exhibit XX, and ask you if that bill was audited and paid by the City of Portland, and to what

it related. What it covered with reference to the Charter of the City of Portland, and the foreword, the explanatory note, which was submitted to be voted on at the election in June, 1902.

A. This is a bill for 10,000 copies of the proposed charter; Original Bid, \$750.00; additional pages and resetting two-thirds of charter (including index), headlines, etc., \$232.00, making a total of \$982.00 which was O-Ked by Sanderson Reed, Clerk, approved by R. L. Glisan, H. W. Hogue and Richard W. Montague, Charter Board Committee.

Q. Was it paid?

A. The bill was paid, yes, sir. It was paid by warrant drawn against the City of Portland; ordered paid by the Council and paid by warrant.

Q. I show you the proposed Charter of the City of Portland, approved by the Charter Board, and to be voted on at the election in June, 1902, which may be identified as Plaintiff's Exhibit YY, and ask you if that is the charter, 10,000 copies of which were ordered printed and paid for.

808

A. Yes, sir, it is.

Mr. FENTON: I offer in evidence both exhibits.

Mr. KAVANAUGH: I object; to the bill first as being utterly immaterial, incompetent and irrelevant, and having no relation to the issues; also to the offer of the proposed charter, I object to the admission of the proposed charter for the reason that it is not the same as the charter of the city of Portland, contains matter which is not contained in the charter as passed by the Legislative Assembly, and consequently is immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Schwab Bros. Bill marked Plaintiff's Exhibit XX.

Proposed Charter marked Plaintiff's Exhibit YY.

Q. Do you know if this is the document—plaintiff's exhibit YY—that was circulated before that election—one of the 10,000 that was circulated?

A. This is; yes, sir, this is one.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Mr. Grutze, do you know whether this sample that you have examined is the same in all respects, including the foreword and preface as the Act of the Legislative Assembly which constitutes the present charter of the City of Portland?

A. I do not. I have never examined them.

Q. Do you know that the foreword is not a part of the charter, as passed by the Legislature?

A. That has been my understanding.

Mr. FENTON: Otherwise it is the same?

Mr. KAVANAUGH: I am not quite sure; have heard there were differences.

809

Redirect examination:

Q. With the exception of the foreword, it is the same, isn't it?

A. Yes, sir.

Witness excused.

810 SANDERSON REED, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. FENTON:

— Mr. Reed, you were Secretary of the Charter Board that prepared and submitted to the vote of the people, the present Charter, of the City of Portland, were you not?

A. Yes, Clerk.

Q. Clerk. I show you Plaintiff's Exhibit YY, and will ask you if that is the document that was submitted to be voted on at the election in June, 1902, and adopted by the Charter Board.

A. The charter was voted on and was adopted with the exception of the last clause. Well, it was adopted as it was printed, yes. The Legislature changed the last clause.

Q. The last section?

A. Made it an emergency bill, if my recollection is right.

Q. Yes, this—What is the fact as to your submitting this to the printer to be printed the same in form in which it is here, including the explanatory note or foreword?

A. The explanatory note or foreword—

Mr. KAVANAUGH: Same objection.

A. —was passed in to me as Clerk with the rest of the Charter, and was printed as emanating from the same sources, and with the Charter, if my recollection is right, and I think it is.

Q. Then the Charter Board adopted this as it is?

811 A. Adopted it as it is, and paid for it in the last minutes by an order.

Cross-examination.

Questions by Mr. KAVANAUGH:

— Do you know, Mr. Reed, whether the Charter Board ever adopted or formally approved the foreword?

A. I can't remember that far back; as far as memory is concerned, but I am absolutely—

Q. You know they adopted the rest of the Charter?

A. I was going to say I was absolutely sure, or I never would have had it printed, could not have been printed without being absolutely known to and a part of the act of the Charter Board.

Q. Who prepared that foreword?

A. I think Mr. Mills did, and Joe Teal.

Q. It was not the action of the whole board?

A. I think it was. It was just as much the action of the whole Board as any part of the Charter was the action of the whole Board. The Charter Board was composed of a number of sub-committees, and a Revision Committee, and the sub-committee did their work, and what they did not do, the Revision Committee did, and it was adopted by the Board. This was a sub-committee's work, I think.

Q. What was it intended for?

A. Beg Pardon?

Q. What was it intended for?

A. Well, it was intended to elucidate the situation.

Q. As an argument in favor of the adoption of the Charter?

A. I think it was, yes.

Witness excused.

812 S. GRUTZE recalled by plaintiff.

Questions by Mr. FENTON:

— Have you the Journal that was kept by the Charter Commission?

A. Yes, sir.

Q. Kept by Mr. Reed?

A. Yes, sir.

Q. The Secretary?

A. Yes, sir.

Q. I wish you would turn to the entry ordering this Charter to be printed, these 10,000 to be printed, and read that, Mr. Grutze.

A. This appears to be under an adjourned meeting of the Charter Board of the City of Portland, held in the Council Chamber on February 14, 1902, at 8 o'clock p. m. Among other things appears the following:—"Mr. Teal moved that the Charter be published in pamphlet form and that 10,000 copies be printed, which motion was seconded and carried."

Q. Those minutes were signed by Mr. Reed?

A. "Thereupon the meeting adjourned. Sanderson Reed, Clerk."

Q. You know Mr. Reed's signature?

A. Yes, sir.

Mr. FENTON: I offer that entry which witness has read, to show the authority to publish.

Mr. KAVANAUGH: Objected to as immaterial, incompetent and irrelevant.

Objection over-ruled; exception saved.

Marked Plaintiff's Exhibit ZZ.

Witness excused.

813 Mr. FENTON: If the Court please, I have one ordinance here which I wish to offer as tending to show contemporaneous construction on the part of the Council that passed the ordinance under consideration, No. 599—ordinance No. 568, and I have the Revised Ordinances of the City of Portland January, 1905, and if there is no objection on the part of the counsel, I should like to have

the ordinance read into the record, without the expense and trouble of getting a certified copy.

Mr. KAVANAUGH: I think they are proper in the book. I think they are authentic. Of course I object to the introduction of the ordinance as immaterial, but not to the authenticity.

Ordinance No. 568 marked Plaintiff's Ex. AAA.

814

COMPLAINANT'S EXHIBIT AAA.

Ordinance No. 568

An Ordinance Granting Permission to James B. Stevens and Walter Moffett to construct a Wharf Adjoining Lot No. One (1), Block No. Seventy-two (72), and the South Half of Lot No. Four (4), in Block No. Seventy-three (73) in the City of Portland, and to Grade and Plank so Much of that Portion of Main Street Lying East of the East Line of Front Street as May be Necessary for a Convenient Passage to and from the Wharf.

The City of Portland Does Ordain as Follows:

SEC. 1. That James B. Stevens and Walter Moffett have the authority and consent of the Common Council to construct a wharf adjoining on the east Lot One (1) in Block Seventy-two (72) and the South Half of Lot Four (4) in Block Seventy-three (73) in such manner that the same shall not unnecessarily interfere with the navigation of the Willamette River adjacent thereto.

SEC. 2. That said Stevens and Moffett have the authority and the consent of the Common Council to grade and plank so much of that portion of Main Street lying east of the east line of Front Street as may be necessary for a convenient passage to and from the wharf.

SEC. 3. That said parties shall in all respects comply with the directions of the Committee on Streets and Public Property and the Street Commissioner in the construction of said wharf, grading and planking and at all times comply with such regulation as the Common Council may prescribe governing wharves.

815 SEC. 4. The authority, consent and privilege hereby granted to remain only during the pleasure of the Common Council.

Approved October 10, 1868.

816 Mr. FENTON: I also offer Ordinance No. 619 of the compilation of 1884. Also No. 1065. I don't wish to offer all of these ordinances, because it will unnecessarily encumber the records, but I want to offer such of them here as I think are relevant and material, for the purpose of getting contemporaneous construction, and I will give counsel a list of the ordinances and ask leave to read such portion of them into the record as may be material. I have a list here. These are for the purpose of showing, your Honor, that under the various charters of the City of Portland, the council at times granted limited franchises, and at other times granted franchises without limit, and at other times, granted to street railways thirty year franchises.

Mr. KAVANAUGH: These do not relate to this company?

Mr. FENTON: Some do, and some do not.

Mr. KAVANAUGH: All subject to the same objection.

Ordinance No. 619, Complainant's Exhibit "BBB."

COMPLAINANT'S EXHIBIT No. BBB.

Ordinance No. 619.

An Ordinance Adopting a Map Showing the Plan of the Streets, Blocks and Public Property in the City of Portland.

Whereas, the Common Council of the City of Portland, at its regular meeting held April 29, 1852, adopted the map commonly known as the "Brady Map" as the plan of streets, blocks and public property, and

Whereas, since that date several additions have been made to the city, and whereas a complete plan of all the streets, blocks and public property has been made by order of the Common Council, 817 by C. W. Burrage, and submitted at a meeting of the Common Council held July 18, 1866; now therefore,

The City of Portland does ordain as follows:

SEC. 1. That the "Map of the City of Portland, surveyed and drawn by order of the Common Council, by C. W. Burrage, City Surveyor, 1866," be and is hereby adopted as the official map of the city, showing the plan of the streets, blocks and public property within the city limits.

SEC. 2. That the Auditor and Clerk be and is hereby directed to attach to said map a certified copy of this ordinance, and cause said map and ordinance to be recorded in the records of Deeds in the office of the County Clerk of Multnomah County, Oregon.

Approved February 27, 1869.

818 Mr. FENTON: I offer a portion of Ordinance 1065.

Mr. KAVANAUGH: Same objection.

Objection overruled; exception saved.

Ordinance No. 1065 marked Complainant's Exhibit CCC.

Ordinance No. 1065.

An Ordinance Authorizing the Construction and Operation of Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and hereby is granted unto Levi Estes the right and privilege to lay down and maintain an iron railroad track or tracks within the City of Portland, as follows, viz:

Along North First, First and South First streets; Fifth, North Fifth and South Fifth streets; B street, Washington Street, Taylor Street, Jefferson Street, and Hall Street; and to operate and run

cars thereon to be drawn as hereinafter provided and to convey for hire passengers and their luggage thereon.

SEC. 2. That said Levi Estes, or his assigns, owner or owners of said railway, shall plank, pave or macadamize, as the municipal authorities shall direct, that portion of the street or streets along which their railways shall be laid, the whole length of said railways, between the rails, and shall put and keep in repair such other portions of the street as shall be disturbed in putting down such railway or repairing the same.

* * * * *

SEC. 14. All the rights and privileges hereby granted shall expire at the end of twenty-five years from the date of the approval of this ordinance.

Approved September 12, 1871.

819 Mr. FENTON: I wish to call particular attention of Counsel to an ordinance granting to the Oregon & California Railroad Company a sidetrack for the use of the Union Meat Company, in connection with the Fourth Street Line, showing the recognition by the City Council of the Oregon & California Railroad Company as the owner of the Fourth Street franchise and as entitled to use and operate the same, as the successor of the Oregon Central.

Objected to as immaterial, incompetent and irrelevant.

Objection over-ruled; exception saved.

Ordinance referred to is No. 8099, Exhibit QQ.

Mr. FENTON: I offer Sections 95, 97, 100 and 101 of the Charter; I offer these because it relates to Section 106, on which we rely. Section 95 of Charter, Complainant's Exhibit VV.

Section 97 of Charter, Complainant's Exhibit DDD, as follows;

Section 97, City Charter.

Ordinance Embodying Franchise to be Published.

SEC. 97. Before any grant of any franchise or right to use any highway, avenue, street, lane or alley or other public property, either on, above or below the surface of the same shall be made, the proposed specific grant shall be embodied in the form of an ordinance, with all the terms and conditions, including all provisions as to rates, fares and charges, if any, which proposed ordinance shall be published in full at the expense of the applicant for the franchise, at least twice in the city official newspaper. Such publication shall take place and be completed not less than twenty nor
820 nance, and such ordinance shall require for its passage the affirmative vote of at least two-thirds of all the members of the Council, as shown by the "yeas" and "nays," and the approval of the Mayor before it shall be valid for any purpose; but in case the Mayor should veto any such ordinance it can only be passed over such veto by a four-fifths vote of all the members of said Coun-

cil, in which case the same shall be valid without the Mayor's approval from and after such passage. No amendment to any franchise after publication shall be valid unless the ordinance as amended shall be republished in like manner and for like time as the original.

Section 100 of City Charter marked Complainant's Exhibit EEE.

Taxation: Requirements of all Franchises: Street Repair: Abandonment.

SEC. 100. Every franchise granted under this charter shall be taken and deemed as property and shall be subject to taxation as property. Franchises granted to persons or corporations to construct, maintain and operate street railways and other railways and tramways shall provide that the grantee of the franchise or his or its assigns, representatives and successors shall keep those portions of the streets and other public places occupied by said street railways or other railways or tramways in good repair and as required by the Council, and that all persons or corporations to whom franchises are granted to lay down tracks for street railways or other railways and their or its representatives or successors, shall during the life
821 of such franchise, plank, pave, repave, reconstruct or otherwise improve or repair or maintain in good condition and in the manner directed by the Council and by the Executive Board the whole or any portion of the streets along or over which said street railways or other railways shall be constructed, lying between the rails of any track thereof and extending one foot outside of such rails, and also the portions of the street lying between any two tracks; but in the cases of the franchise or rights granted under sections 102 and 103 of this Charter it may be provided in said franchise that said grantee or his or its assigns, representatives and successors, shall pave, repave and keep in repair as required by the Council the streets used by such railroad from curb to curb.

Such franchise shall contain a provision that in the event any street, or portion of a street, or other public place, granted by said franchise and used by such grantee, his or its representatives and successors, shall during the life of the franchise be abandoned by such grantee his or its successors or assigns, such grantee, or his or its successors or assigns shall forthwith be required to remove its tracks and other property therefrom, and on the removal thereof restore, repair or reconstruct that portion of the street which under his, its or their franchise was to be kept in repair by the grantee, their, his or its, successors or assigns so that it shall be placed in such condition as may be required by the Council and shall contain a provision to the effect that a failure to comply within a reasonable time with any of the provisions or conditions of such
822 franchise shall authorize the city to declare an immediate forfeiture of such franchise and in the case of said street railways, or other railways or tramways the road or track constructed thereunder shall likewise be forfeited, or in case of such failure, or neglect or refusal of the grantee after thirty days' notice

given by the Council to repair, improve or maintain as above set out the portions of the streets above described then that the said city may at its option do such work and the cost of the same as ascertained and declared by the Council shall be entered in the docket of City Liens and enforced in like manner and with like effect as a general tax upon real or personal property of the grantee after delinquency.

If any street or public place be abandoned as aforesaid, that portion of the franchise under which said street or public place was used by the grantee or his successors shall thereafter be null and void, and shall be forfeited without any further action on the part of the city. On any street or public place being abandoned as aforesaid, the City Engineer shall forthwith file with the Auditor, a certificate giving date of abandonment and description of the street or public place so abandoned, and the Auditor shall forthwith file the same and enter a notation thereof on the records of such franchise in his office. Such franchise shall also contain a provision that if electrical currents are used or employed in or about the use of said franchise or the plant connected therewith, then that the said grantee, his, its or their successors as assigns shall provide and put in use such means and appliances as will control and effectually contain such currents in their proper channels, and on his, its or their own wires, tracks and other structures, so as to prevent injury to the property, pipes and other structures belonging to the City of Portland
 823 or to any person, firm or corporation within said city, and to repair and renew said means and appliances and from time to time to change and improve the same as may be necessary to accomplish said purpose, all at his, its or their charge and expense, and at his, its or their own risk, selecting and adopting such means and appliances as shall prevent injury to the property, pipes and other structures belonging to the said City of Portland or to any person, firm or corporation.

Section 101 marked Complainant's Exhibit FFF.

Further Requirements to be Stated in Ordinance: Time of Construction: Cost: and Time of Completion of Work in Certain Cases.

SEC. 101. In addition to the conditions otherwise required by this Charter and such other conditions as may be prescribed by the Council, franchises must provide for the time of beginning the construction of work thereunder, the estimated total cost of such work, the monthly or yearly sums of money to be expended thereon, and in the case of franchises running to railroad companies, street-car companies and other companies, covering certain streets or portions of streets in such franchises described, fix the time within which the work to be done under such franchise shall be completed upon such streets or portions of streets so described therein.

Mr. FENTON: I want to offer that portion of the Charter in ref-

erence to nuisances, and Health & Police Power of the City,
824 sub-divisions 25 to 46 of Section 73, relating to "Powers relating to Public Health, Welfare and Safety."
Marked Complainant's Exhibit "GGG."

COMPLAINANT'S EXHIBIT "GGG."

(c. Powers Relating to Public Health, Welfare and Safety.)

(25.) To make regulations to prevent the introduction of contagious diseases into the city, and to remove persons afflicted with such diseases therefrom to suitable hospitals provided by the city for that purpose, which hospitals may be within or without said city; and to provide and to regulate ~~the~~ hospitals; to secure the protection of persons and property therein, and to provide for the health, cleanliness, ornament, peace and good order of the city.

(26.) To prevent and remove nuisances and to declare what shall constitute the same, and to punish persons committing or suffering nuisances, and to provide the manner of their removal, and to make the cost of such removal a lien upon the property where such nuisance existed; and to fill up or drain any lots, blocks or parcels of land where any stagnant water stands, and to declare the same a nuisance, and to make the cost of filling up or draining the same a lien upon the property so filled or drained. Such liens may upon the order of the Council be entered in the docket of city liens and thereafter collected in the same manner as assessments for street improvements, or may be collected in such other manner as the Council may direct.

825 (27.) To regulate, restrain and to provide for the exclusion from the city, or any part thereof, of stock-yards, tanneries, slaughter houses, wash houses and laundries and all other offensive trades, occupations or businesses.

(28.) To regulate the plumbing, drainage and sewerage of buildings and the use of steam boilers and steam generators, to provide for the registration of plumbers and stationary engineers; to create the offices and define the duties of plumbing inspector and of boiler inspector.

(29.) To compel all persons erecting or maintaining privies or cess-pools within one hundred feet of any street in which a sewer has or may hereafter be constructed, to connect the same therewith; provided, that in cases where blocks are more than two hundred feet in width, this authority shall extend to the center of the block.

(30.) To regulate the construction, care, use and management of hotels, tenement houses, lodging houses and cellars in the City of Portland for the better protection of the lives and health of the inmates dwelling therein, and of others.

(31.) To regulate and to provide for and determine the number and size of places of entrance and exit from all theaters, public halls, places of amusement, churches and other buildings used for public gatherings, and the modes of hanging doors thereat.

(32.) To prevent and prohibit the erection of dangerous and unsafe buildings, and to cause the removal or tearing down of same, wherever situated.

(33.) To prevent the erection or moving of buildings within the city limits which shall be dangerous to the passers-by or to the adjacent property or an obstruction to public travel; and in case any building or structure shall become dangerous to passers-by, the Council shall have power to cause the same to be removed or made safe at the expense of the property upon five days' notice to the owner thereof or his agent, and to determine by resolution when the same is dangerous. Such expense shall be made a lien upon the property. Such liens may upon the order of the Council be entered in the docket of city liens and thereafter collected in the same manner as assessments for street improvements or may be collected in such other manner as the Council may direct.

(34.) To define the fire limits and to prohibit the erection or repair of wooden buildings within the fire limits; to regulate the height, construction, inspection and repair of all private and public buildings within the city; and to create the office and define the duties of building inspector; to establish sidewalk districts and to determine the character of sidewalks in any of said districts and to specify the time at the expiration of which all the sidewalks shall be of a specified character.

(35.) To require adequate fire escapes, apparatus and appliances, for protection against fires, to be provided in buildings.

(36.) To regulate or prevent the storage, manufacture and sale of dangerous, explosive, or combustible materials, including gun-powder, dynamite, giant powder, calcium carbide, nitro-glycerine, oil and gas, and to provide for the inspection of the same; to prevent by all proper means all risks of injury or damage by fire arising from negligence or otherwise.

(37.) To regulate the transportation of gun-powder, dynamite, nitro-glycerine and other combustibles and explosives through the streets of the city.

(38.) To regulate and prohibit the use of all guns, pistols and firearms, missile weapons, fireworks, firecrackers, bombs and all detonators of all descriptions.

(39.) To regulate and prevent public criers, advertising notices, steam whistles, the ringing of bells and playing of bands.

(40.) To regulate, prevent and prohibit the erection, maintenance or display of signboards and billboards, and of signs, posters or other advertisements, or advertising matter which are of offensive, improper, unsightly, indecent, lascivious or obscene upon, along or near the sidewalks, streets or public places.

(41.) To regulate and prohibit the exhibition and hanging of banners and placards or flags in or across the street or from houses or other buildings.

(42.) To regulate or to prohibit the driving of horses, cattle, sheep, hogs and other animals and livestock through the streets.

(43.) To restrain and regulate the keeping of all domestic animals and to prevent any and all domestic animals from running at

large within the city or any part thereof, and to punish those who allow animals so to run; to provide for the impounding of the same and also to provide for the sale of such animals upon five days' notice.

(44.) To regulate and restrain the keeping and the running at large of dogs; to punish those persons who allow their dogs to be unlicensed or to run at large against the regulations established, and to provide for the impounding of dogs and for the killing of the same when kept against such regulations, or on which no license has been obtained or tax xpaid as provided by the Council.

(45.) To protect the public from injury by runaways by punishing persons who leave horses or carriages in the streets without being fastened.

(46.) To require all railways and railroads to provide proper fenders and other safety appliances and the latest and most approved machinery and methods for their cars and tracks and the operation thereof for the protection of human life and the lessening of danger thereto and to enforce such regulations by such fines and penalties as may be prescribed by ordinance.

MR. FENTON: I have here a certified copy of the map of definite location of the Oregon Central that I had to send to Washington for.

Map marked Complainant's Exhibit "HHH."

(Map heretofore offered at close of Complainant's case.)

829 MR. FENTON: I wish to have identified the ordinance, the number of which was left blank in the record. This is ordinance No. 3479, showing the vacation of North Fourth Street, so that this railroad could get into the Northern Pacific Terminal Company and use part of it.

Ordinance No. 3479 referred to is Plaintiff's Exhibit "JJ".

MR. FENTON: Ordinance No. 2969.

Objected to as incompetent, irrelevant and immaterial.

Objection over-ruled; exception saved.

Ordinance No. 2969, Exhibit "III".

830 Ordinance No. 2969 marked Complainant's Exhibit III.

An Ordinance Authorizing the Oregonian Railway Company (Limited) to Lay a Railway Track and Run Cars Over the Same Within the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. The Oregonian Railway Company (Limited) is hereby authorized and permitted to place a railway track and run cars over the same in or on streets hereinafter designated, to-wit; In Mill Street from the northwest corner of block No. 103 in the City of Portland, to Front Street, and in Front Street from where such track enters Front Street, to Madison Street, and thence in Madison Street by a convenient curve to the east line of Block 71 in said city. The track shall in all instances be laid along the center of the respective

streets, except where curves are necessary; but in no instance shall such track be further than 15 feet from the center of the street along which it is laid. The elevation of such track when laid in Front Street shall conform to the established grade of said Front Street.

SEC. 2. The said railroad company shall grade to established grades, and construct and maintain in good repair said streets, at least three feet in width, upon each side of the center line of said track, and as much wider as may be affected by said railway, or the construction thereof, in such manner and as often as the Common Council of the City of Portland may at any time provide for or require.

SEC. 3. The Common Council reserve the right to make or to alter regulations at any time, as they may deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time, and in such manner as they may deem necessary.

SEC. 4. It is hereby expressly provided that any refusal or neglect of the said Oregonian Railway Company (Limited) to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance the forfeiture of the same and to cause the said rails to be removed from said streets.

Approved January 7, 1881.

832 Mr. FENTON: I offer ordinance No. 3036.
 Objected to as immaterial, incompetent and irrelevant.
 Objection over-ruled; exception saved.
 Ordinance No. 3036 Complainant's Exhibit "JJJ".

"COMPLAINANT'S EXHIBIT "JJJ".

Ordinance No. 3036.

An Ordinance Prohibiting the Blowing of Steam Railroad Whistles Within the City Limits.

Whereas, it is within the power and authority conferred upon the Common Council by the charter of the City of Portland to prohibit the blowing of steam whistles within the city limits; and,

Whereas, All ordinances passed by the Common Council granting the right to lay tracks and run cars over the same in the city contain a provision reserving the right to make such regulation as the Council deem proper for the conduct of said road within the limits of the City, therefore

The City of Portland does ordain as follows:

SEC. 1. That from and after the approval of this ordinance, it shall be unlawful for any steam railroad to blow a steam whistle

within the limits of the city of Portland, except as a signal of danger.

SEC. 2. A violation of the provisions of this ordinance shall be deemed a misdemeanor, and on conviction thereof, the offender shall be subject to a fine of not less than ten dollars (\$10) nor more than fifty (\$50) dollars, or imprisonment in the city jail not less than five (5) days, nor more than twenty-five (25) days.

Approved March 18, 1881.

833 Mr. FENTON: I offer Ordinance No. 3477.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3477 marked Complainant's Exhibit KKK.

COMPLAINANT'S EXHIBIT KKK.

An Ordinance Authorizing D. E. Budd and His Associates to Construct and Operate Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto D. E. Budd and such other person or persons as he may associate with himself therein, the right and privilege to lay down and maintain an iron railroad track or tracks and to operate street railways within the City of Portland as follows, to-wit; First, along Washington Street from First street to its intersection with the center line of B Street. Second, along North Twentieth Street from the center line of B Street to the center of S Street. Third, along Eleventh Street from the center line of Washington to Market Street, the line of route on Eleventh to be a continuation of the line or route on Washington street.

* * * * *

SEC. 15. All the rights and privileges hereby granted shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

Approved June 12, 1882.

834 Mr. FENTON: I offer Ordinance No. 3637.

Objected to as incompetent, immaterial and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3637 marked Complainant's Exhibit LLL.

COMPLAINANT'S EXHIBIT LLL.

Ordinance No. 3637.

An Ordinance Authorizing the Construction and Operation of a Street Railway on Certain Streets in the City of Portland, Oregon.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto H. W. Monastes, Joseph Paquet, L. W. Bates, and D. F. Leahy, and F. M. Speed,

jointly, and their associates, successors and assigns, the right to construct, maintain and operate, with animals, a single track street railway, with the necessary turnouts and appurtenances for the period of thirty years from the passage of this ordinance on the following named streets in the city of Portland in the manner and upon the conditions hereinafter prescribed:

First. Beginning on the West side of First Street on Stark Street, thence along Stark Street to Second Street, thence along Second and North Second streets to C street, thence along C street to northeast Park Street, thence along North East Park Street to H Street, thence along H Street to North West Park Street.

Second. From the intersection of Stark and Second Streets, along Second to Yamhill, thence on Yamhill to Sixth, thence along Sixth and South Sixth street- to Caruthers.

* * * * *

835 Approved December 8, 1882.

Mr. FENTON: I offer Ordinance No. 3639.

Objected to as immaterial, irrelevant and incompetent.

Objection overruled; exception saved.

Ordinance No. 3639 marked Complainant's Exhibit MMM.

COMPLAINANT'S EXHIBIT MMM.

Ordinance No. 3639.

An Ordinance Granting the Multnomah Railway Company the Right to Construct and Operate Street Railways.

The City of Portland does ordain as follows:

SEC. 1. That there be and hereby is granted to the Multnomah Railway Company, its successors and assigns, the right and privilege to lay down and maintain an iron or steel track or tracks and to operate street railways within the city of Portland as follows: North—from west side of Front Street at Morrison street, along Morrison street, to Sixth street, thence along Sixth street to Pine street, thence along Pine street to North Seventh street, thence along North Seventh street to H street, thence along H street to North Eighth street, thence on North Eighth street to P street.

* * * * *

Approved December 8, 1882.

836 Mr. FENTON: I offer Ordinance No. 3672.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3672 marked Complainant's Exhibit NNN.

COMPLAINANT'S EXHIBIT NNN.

Ordinance No. 3672.

An Ordinance Authorizing the Transcontinental Street Railway Company to Construct and Operate Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto the Transcontinental Street Railway Company the right and privilege to lay down and maintain an iron railroad track or tracks and to operate street railways within the city of Portland as follows, to-wit:

Along G street from North Twenty-first Street to North Third street, along North Third street, Third, and South Third Street, from G street to Sheridan street.

* * * * *

SEC. 16. All rights and privileges hereby conferred shall expire at the end of thirty years from the date of the approval of this ordinance.

Approved December 22, 1882.

837 Mr. FENTON: I offer Ordinance No. 3684.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled, exception saved.

Ordinance No. 3684 marked Complainant's Exhibit OOO.

COMPLAINANT'S EXHIBIT OOO.

An Ordinance Granting to the Multnomah Street Railway Company the Right to Construct and Operate a Street Railway on Certain Streets in the City of Portland, Oregon.

The City of Portland does ordain as follows:

SEC. 1. The right is hereby granted to the Multnomah Street Railway Company and assigns, to lay down and maintain for a period of thirty years from the date of the passage of this ordinance a single track, or double — railway, at the option of said railway company, with the necessary turnouts and turntables, and operate thereon passenger cars, upon certain streets within the limits of the city of Portland, to-wit: On North Fifteenth street from B street to S street, also on B street from First street to the present western boundary of the city, with the privilege of extending the same on the line of B street extended to the city park; provided, that, after said B street is extended and graded under authority of the city, to the City Park, the railway track hereby authorized thereon shall be laid down on such extension within six months thereafter. A failure so to do shall work a forfeiture of the privilege hereby granted to lay said railway track on said extension of B street. Said railway

track is to be composed of iron or steel rails weighing not less than twenty-three (23) pounds to the yard and is to be laid of the same width as the railway track now laid on Washington Street.

* * * * *

Approved January 5, 1883.

Mr. FENTON: I offer Ordinance No. 3773.

Objected to as immaterial, irrelevant and incompetent.

Objection overruled; exception saved.

Ordinance No. 3773, marked Complainant's Exhibit PPP.

COMPLAINANT'S EXHIBIT PPP.

Ordinance No. 3773.

An Ordinance Authorizing D. E. Budd, C. J. McDougall, Ira B. Sturges and Chas. F. Crowell to Construct and Operate Certain Street Railways in the City of Portland, Oregon.

The City of Portland does ordain as follows:

SEC. 1. That there be and hereby is granted unto D. E. Budd, C. J. McDougall, Ira B. Sturges and Charles F. Crowell and such other person or persons as they may associate with them, the right and privilege to lay down and maintain an iron railway track or tracks, and to operate a street railway within the city of Portland, as follows, to-wit: First, beginning at the east end of Jefferson street and Water street and running thence southerly along Water street crossing Columbia, Clay, Market, Mill, Montgomery, Harrison, Hall, Lincoln, Grant, Sheridan, and Caruthers streets to Block F. Thence southerly across block F to Sheridan street as soon as a street shall be opened up and improved through said Block F; thence in the same course crossing Sheridan street to the center of unnamed streets not yet opened up — improved, between the old Jewish cemetery and blocks I, J, K, L, M, and P. Thence along said unnamed streets in a southerly direction to Woods street; thence across Woods street south along Hood street, crossing Grover street to Gibbs street; thence east along Gibbs streets to Multnomah street; thence along Multnomah street to the south limit of the city of Portland.

* * * * *

SEC. 15. All the rights and privileges hereby granted shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

Approved May 4, 1883.

Mr. FENTON: I offer Ordinance No. 3829.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3829 marked Complainant's Exhibit QQQ.

COMPLAINANT'S EXHIBIT QQQ.

Ordinance No. 3829.

An Ordinance Authorizing the Transcontinental Street Railway Company to Construct and Operate Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto the Transcontinental Street Railway Company the right and privilege to lay down and maintain an iron railroad track or tracks, and to operate 840 street railways within the City of Portland as follows, to-wit: Along North Thirteenth Street from the center line of G street to the center of S street; thence westerly along the center line of S street to the center line of North Sixteenth street.

* * * * *

SEC. 16. All rights and privileges hereby conferred shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

In force by operation of law, June 18, 1883.

Mr. FENTON: I offer Ordinance No. 3884.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3884 marked Complainant's Exhibit RRR.

COMPLAINANT'S EXHIBIT RRR.

Ordinance No. 3884.

An Ordinance Granting to the Multnomah Street Railway Company the Right to Construct and Operate a Street Railway on Certain Streets in the City of Portland, Oregon.

The City of Portland does ordain as follows:

SEC. 1. The right is hereby granted to the Multnomah Street Railway Company and its assigns to lay down and maintain for a period of thirty years from the date of the passage of this ordinance, a single or double track railway, at the option of said railway company, with the necessary turnouts and turntables, and operate thereon passenger cars, upon certain streets within the limits of the city of Portland, to-wit: On Eleventh Street from the North line of Market street to the north line of Montgomery street, in the 841 city of Portland, said railway track or tracks to be composed of iron or steel rails weighing not less than twenty-three (23) pounds to the yard and to be laid of the same width as the railway now laid on Washington and Eleventh streets, in said city.

* * * * *

Approved July 20, 1883.

Mr. FENTON: I offer Ordinance No. 3903.

Objected to as incompetent, immaterial and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3903 marked Complainant's Exhibit SSS.

COMPLAINANT'S EXHIBIT SSS.

Ordinance No. 3903.

An Ordinance Authorizing George W. Weidler and Robert Irving and Their Assigns to Construct, Maintain and Operate Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto George W. Weidler and Robert Irving, and their assigns the right and privilege to lay down, maintain and operate an iron railway track or tracks and to operate street railways within the city of Portland, as follows, to-wit:

First. Commencing at what would be the center line of North Front Street if extended at the north boundary line of the city, thence along North Front Street extended and North Front street to its intersection with F street; thence along F street to 842 North Second street, thence southerly along North Second and Second streets to Morrison or Yamhill streets, thence westerly along either Morrison or Yamhill streets to the intersection of Sixth street, thence southerly along Sixth street, to Jefferson, thence westerly along Jefferson street and the Canyon road to the west boundary line of the city.

Second. From the intersection of North Front and D streets along D street to the center line of North Eighteenth street, thence along North Eighteenth street to the center line of E street, thence along E street westerly to the center line of what is known as the Balch County Road, thence northerly to a connection with the center of North Twenty-second Street, thence along North Twenty-second street to its intersection with P street, thence easterly along P street to the center of North Eighth street, thence southerly along North Eighth street to its intersection with D street.

* * * * *

SEC. 16. All rights and privileges hereby conferred shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

* * * * *

Approved August 17, 1883.

Mr. FENTON: I offer Ordinance No. 3935.

Objected to as immaterial, incompetent and irrelevant.

Objection overruled; exception saved.

Ordinance No. 3935 marked Complainant's Exhibit TTT.

COMPLAINANT'S EXHIBIT No. TTT.

843

Ordinance No. 3935.

An Ordinance to Amend Ordinance No. 3656, Entitled "An Ordinance Authorizing the Northern Pacific Terminal Company of Oregon, its Successors and Assigns, to Construct and Maintain a Double Railway Track in North Front Street, in the City of Portland, from the Northern Limits of said City to the South Line of P Street, and a Single Track from thence to a Point Opposite the Southwest Corner of Block G and Eighty Feet Distant therefrom, with a Sidetrack from a Point Opposite Block 220 to Block H, both in Couch's Addition to said City of Portland, also Sufficient and Suitable Sidetracks from, at, or near the Foot of P Street, Curving across and along East and West Park Streets and M, N, O and P Streets, and to Confirm to the Oregon and California Railroad Company the Right to Maintain and Operate its Main and Side Tracks in North Front Street in said City." Approved December 8, 1882.

The City of Portland does ordain as follows:

SEC. 1. That Section 1 of said Ordinance No. 3656, approved December 8, 1882, be and the same is hereby amended, so as to authorize and permit the Northern Pacific Terminal Company of Oregon to construct and maintain a double railroad track along North Front street in the City of Portland, the center line of each track to be located seven feet from and on either side of the center line of said street from the northern boundary of said city to a point of intersection with the south line of P street instead of six feet from and on either side of the center line of said Front street as in said Ordinance No. 3656 now provided.

844 SEC. 2. That said Section 1 of said Ordinance No. 3656 be and the same is hereby amended so that the same shall hereafter read as follows:

SEC. 1. The Northern Pacific Terminal Company of Oregon its successors and assigns are hereby authorized and permitted to construct and maintain a double railroad track along North Front street in the City of Portland, the center line of each track to be located seven feet from and on either side of the center line of said street from the northern boundary line of said city to a point of intersection with the south line of P street in Couch's Addition to said city produced, and a single track from thence to a point opposite the southeast corner of Block G in said Couch's Addition with its center eighty feet in an easterly direction therefrom.

And also a side track from a point in said main track opposite the southeast corner of fractional Block 222 in said Couch's Addition, to a point at or near the northwest corner of fractional Block H in said Couch's Addition with a branch track from a point in said side track near the southeast corner of Block 221 in said Couch's

Addition to a point in the west line of said Block H about forty feet from the northwest corner thereof.

And also the right to construct and maintain sufficient and suitable side tracks, branches and turnouts branching off from said double track in North Front Street, between the west line of North Eighth street extended, and the west line of East Park street extended thence along in and across East Park street and west
845 Park streets and M, N, O and P streets as nearly as practicable as said main and side tracks are now shown and designated upon the annexed map or plat by red lines which plat is made part hereof, and to run locomotives and cars over the same upon the terms and conditions herein provided.

The Northern Pacific Terminal Company in the exercise of the rights and privileges hereby granted shall not construct any of its main or side tracks in or along North Front Street east of the east line of East Park Street, extended, unless, or until it shall have agreed with the Oregon and California Railroad Company for the purchase or leasing of the property of said Oregon and California Railroad Company, situate on either side of said Front street for terminal purposes and for the occupation or use by the said Oregon and California Railroad Company in common with other railroad and transportation companies of the terminal facilities to be provided by the said Northern Pacific Terminal Company, the said Oregon and California Railroad Company, its successors and assigns, is hereby authorized to maintain and operate for the purpose of a railroad operated by steam, its main and side tracks as now located, constructed and used in said North Front street until such time as the Northern Pacific Terminal Company shall have constructed and completed its terminal buildings and railroad tracks, and shall have by agreement with the said Oregon and California Railroad Company extended its tracks upon North Front street south of the east line of East Park street.

846 The right hereby granted may be exercised and tracks, branches, turnouts and sidetracks may be constructed and maintained by the said Northern Pacific Terminal Company, its successors and assigns, for the use of the Northern Pacific Railroad Company, the Oregon Railway and Navigation Company, the Oregon and California Railroad Company, the Oregon Improvement Company, the Oregon and Transcontinental Company, the Oregonian Railway Company, Limited, The Pacific Steamship Company, and any other railroad or transportation companies to whom the right to use the terminal buildings and facilities may be leased by the Northern Pacific Terminal Company.

Approved September 7, 1883.

Mr. FENTON: I offer Ordinance No. 4072.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception saved.

Ordinance No. 4072, marked Complainant's Exhibit UUU.

COMPLAINANT'S EXHIBIT UUU.

Ordinance No. 4072.

An Ordinance Authorizing J. W. Cooke and Julius Ordway and Their Assigns to Construct, Maintain and Operate Street Railways in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto J. W. Cooke and Julius Ordway, and their assigns the right and privilege to lay down, maintain and operate an iron or steel railway track or tracks and to operate a system of street railways within the city of Portland, to-wit:

847 First. Commencing at a point on the center of Stark street where the same intersects the west line of Front street, thence westerly along Stark street, to the center line of Ninth Street.

Second. Commencing at the intersection of North Seventh and N streets and running thence southerly along North Seventh to A street thence southwesterly to Seventh street, and running thence southerly along Seventh street to the center of Morrison street.

Third. Commencing at the intersection of North Fifth and J Streets, thence southerly along North Fifth street, Fifth street and South Fifth street, to the south line of Caruthers.

Fourth. Commencing at the intersection of South Fifth and Caruthers street, thence easterly along Caruthers street to the center of South First street, and thence southerly along South First street to the north line of Thomas street.

Fifth. Commencing at a point on the north line of R street, which point is also the intersection of North Tenth and North Front streets, and running thence southerly along North 10th street to where the same intersects with Ninth street, thence along Ninth street southerly to the north line of Myrtle street.

Sixth. Commencing at the west line of Front street where the same intersects the center line of Montgomery street, thence westerly along Montgomery street to where the same intersects what is known as the Terrace road, thence along said Terrace road to the west boundary thereof.

848 Seventh. Commencing at the intersection of Sixth and Morrison streets, and running thence westerly along Morrison street to the west boundary of said Morrison street.

* * * * *

SEC. 14. All rights and privileges hereby conferred shall expire at the end of thirty (30) years from the date of the approval of this ordinance.

* * * * *

Approved December 21, 1883.

849 Mr. FENTON: Ordinance No. 5100. (Compilation 1905.)
 Objected to as immaterial, incompetent and irrelevant.
 Objection overruled; exception saved.
 Ordinance No. 5100, marked Complainant's Ex. VVV.

COMPLAINANT'S EXHIBIT VVV.

Ordinance No. 5100.

(Railroad Franchise Owned by the Oregon and California Railroad Company, Leased by the Southern Pacific Company.)

An Ordinance Granting to the Portland and Willamette Valley Railway Company, its Successors and Assigns, a Right of Way Over Certain Lands Belonging to the City of Portland.

(Preamble.)

Whereas the Portland and Willamette Valley Railway Company is now constructing a line of railroad connecting the City of Portland with the Willamette Valley;

And whereas it will be necessary for said railroad to pass over certain lands owned by the City of Portland and are now partially occupied by the water works of said city;

And whereas the Water Committee have recommended that said right of way be granted, now therefore,

The City of Portland does ordain as follows:

(Right of Way.)

SECTION 1. The City of Portland hereby grants to the Portland and Willamette Valley Railway Company, its successors and assigns, a right of way for said railroad, as shown and described on the map and plat filed with the petition of the said company, across the following premises, being the same premises conveyed by the East of Scotland Investment Company, Limited, to the Portland
 850 Water Company, dated May 18, 1883, and which deed is recorded at Page 155 of Book 78, Records of Deeds of Multnomah County, State of Oregon, to which reference is hereby made:

(Company to Construct Switch.)

SEC. 2. Said Railway Company shall, within sixty days after the completion of its road from the Town of Dundee to the City of Portland construct a switch from the main track of said railway to the engine house on said lands belonging to the City of Portland, sufficient to hold twenty-two cars and maintain and keep the same in repair. Second, shall upon constructing said railway, construct and maintain and keep in repair a safe and suitable crossing from the Macadam Road to the dwelling house situated on said lands. Third, shall construct, maintain and keep in repair a trestle or sub-

way where said railway line crosses the water main leading from the pump house at the time of constructing said railroad, the same to be constructed in such a manner as to give free access to said main and pipes.

(Acceptance.)

SEC. 3. The Portland and Willamette Valley Railway Company shall, within thirty days after the approval of this Ordinance by the Mayor, file with the Auditor and Clerk a written acceptance of the terms and conditions of this Ordinance.

(Deed for Right of Way to be Executed—When.)

SEC. 4. That upon the compliance with the provisions of this Ordinance by the said Portland and Willamette Valley Railway Company, the Mayor and Auditor and Clerk are hereby instructed to execute and deliver to said Company a good and sufficient deed conveying to said company a right of way over and upon said lands; provided, always, and this right of way is granted upon the express condition that the said City of Portland shall have, and it does hereby reserve the right to make, construct, use and maintain all such road or roads, and the necessary crossings for teams and vehicles, over, across and upon said right of way, and the track or tracks of said company thereon constructed at such points as may be necessary or required, for the use of said City of Portland, or the "Water Committee" and "Water Commission", of said City created by an Act of the Legislative Assembly of the State of Oregon, entitled "An Act to amend an Act entitled 'An Act to incorporate the City of Portland,'" approved October 24, 1882, approved November 25, 1885, or any or either of them or their successors or assigns, the place or points of such crossings to be selected by said "Water Committee" or "Water Commission", or their successors or assigns; and also the right to make, construct, use and maintain all such chute or chutes across said right of way and under the track of said company thereon constructed at such points as may be necessary, convenient or required by the said City of Portland, or said "Water Committee" or "Water Commission" for the purpose of passing wood through the same from the highway on the west side of the said right of way to the pumping station on the east side thereof, and said deed, hereby directed to be made, shall contain the proper clause and provisions to reserve unto said City of Portland, its successors and assigns, the rights herein enumerated.

Passed the Common Council June 15, 1887.

Approved June 17, 1887.

JOHN GATES, *Mayor*.

Acceptance filed, June 17, 1887.

852 Mr. FEXTON: Ordinance No. 5568.

Objected to as incompetent, immaterial, and irrelevant.

Objection overruled; exception saved.

Ordinance No. 5568 marked Complainant's Exhibit WWW.

COMPLAINANT'S EXHIBIT WWW.

Ordinance No. 5568.

(Franchise Owned by the Northern Pacific Terminal Co.)

An Ordinance Authorizing the Northern Pacific Terminal Company of Oregon to Construct and Maintain Certain Railroad Tracks in and Across Certain Streets in the City of Portland.

The City of Portland does ordain as follows:

(Franchise—Route.)

SECTION 1. The Northern Pacific Terminal Company of Oregon, its successors and assigns, is hereby authorized and permitted to construct, lay down and maintain a suitable and sufficient number of railroad tracks in and across North Seventh Street, West Park and East Park Streets, "M", "N", and "O" Streets, in the City of Portland, to connect with the main lines of said company's railroad system in North Portland, as nearly as practicable as shown and described upon the map or plat known as "Plan No. 6" adopted by said company, a copy of which is on file in the office of the Auditor and Clerk of the City of Portland, and to run locomotives and cars over the same; provided, however, that the rails shall be laid flush with the pavement so as not to interfere with the passage of vehicles to any greater extent than is absolutely necessary, and the use and crossing of said streets shall be in such manner as not to interfere with the free use thereof by the public as a highway.

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(Company to Improve—What.)

SECTION 2. Said Northern Pacific Terminal Company of Oregon shall grade to the established grade, macadamize, pave or plank to full width as the Common Council of said city may direct, and maintain in good repair, the portions of said streets so used by it, and over which it constructs and maintains such railroad tracks, between the rails of all its said tracks, and at least two feet in width upon each side thereof, and also to so grade to established grade, macadamize, pave or plank to full width, and maintain in good repair all parts of "M" and "N" streets which lie between North Front street and the bridge hereinafter referred to, and to be constructed as set forth in Section 5 of this Ordinance; and shall do and perform such work, and the improvement and repair of such portions of said streets in such manner and as often as the Common Council of the City of Portland may provide for or require.

(Company to Pay for Street Improvements.)

SECTION 3. Alterations of grades of streets required for the laying of said railway tracks, and all improvements and repairs of the same for said purpose shall be made at the expense of said Northern

Pacific Terminal Company of Oregon, and the same shall be made as provided by ordinance.

(Rights Reserved.)

SECTION 4. The Common Council reserve the right to make or to alter regulations at any time, as they deem proper for enforcing the provisions and terms of this Ordinance, and for the conduct of the said road within the limits of the city, and the speed of rail-
854 way cars and locomotives, within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary and may require said company to employ and station one or two more flagmen on said streets to warn people of the approach of cars, trains or engines.

(Company to Make Certain Improvements—When.)

SECTION 5. The said Northern Pacific Terminal Company shall, at its own cost and expense and within four months from the approval of this Ordinance, construct and maintain in good condition, to the satisfaction of the Common Council, a bridge (equally as commodious, safe and strong as the bridge at present on North Thirteenth Street between "Q" and "R" streets,) on North Seventh street, from the north line of "J" Street to "L" Street, and thence along the westerly side of the tracks of said Terminal Company, as hereinbefore referred to, to "O" street, and to fill to established grade and macadamize or plank, full width all of "O" Street from the west line of West Park Street to the west line of North Front Street, and all of West Park Street from the north line of "O" Street to the west line of North Front street; such bridge shall have a wagon roadway thirty six feet wide with a sidewalk six feet wide and each side thereof; and to keep open as a public highway all that portion of the same running along the westerly side of the tracks from "L" street to "O" street, full width.

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(Forfeiture Clause.)

SECTION 6. For failure to comply with any of the provisions of this Ordinance or any regulation made by the Common Council in pursuance thereof, the Common Council may declare forfeited all the privileges hereby granted and the same shall thereupon become null and void.

(Acceptance.)

SECTION 7. Within ten days from the passage of this Ordinance, said Northern Pacific Terminal Company shall make and file with the Auditor and Clerk, a written acceptance of the provisions of this Ordinance, otherwise it shall not be entitled to any of the benefits, rights, or privileges hereby conferred.

Passed the Common Council, September 7, 1888.

Approved September 11, 1888.

VAN B. DE LASHMUTT, *Mayor.*

Acceptance filed September 15, 1888.

856 Mr. FENTON: I offer Ordinance No. 11086.

Objected to as incompetent, irrelevant and immaterial.

Objection over-ruled; exception saved.

Ordinance No. 11086, Complainant's Exhibit XXX.

COMPLAINANT'S EXHIBIT XXX.

Ordinance No. 11086.

(Franchise Owned by the Northern Pacific Terminal Company.)

An Ordinance Authorizing the Placing of a Permanent Railway Track in Upshur Street Between the Westerly Line of Fifteenth Street to a Point One Hundred Feet Westerly from the West Line of Eighteenth Street, in Watson's Addition to the City of Portland, Multnomah County, Oregon.

The City of Portland does ordain as follows:

(Franchise—Route.)

SECTION 1. That the right and privilege is hereby granted to the Northern Pacific Terminal Company, of Oregon, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, to lay down, maintain and operate a permanent branch railway track of standard gauge in Upshur Street, in Watson's Addition to the City of Portland, County of Multnomah, and State of Oregon, from a connection with the main track of the Northern Pacific Terminal Company of Oregon at a point just westerly from where the west line of Fifteenth street intersects said Upshur Street, and running thence west along said street, outside the curb line, to a point one hundred feet west from the intersection of the west
857 line of Eighteenth Street with said Upshur Street, and opposite the center line of Block 21, in said Watson's Addition to said city.

(Tracks—Streets to Improve.)

SECTION 2. Said branch track shall be laid flush with the pavement or grade of the street, the south rail thirty-six inches from the south curb line of said Upshur Street, and shall be so laid and maintained as not to obstruct or interfere with the public travel or traffic upon said street; and said Northern Pacific Terminal Company shall at all times, while said track is so maintained, keep the street in good repair between the rails of said track and for two feet on each side thereof; and shall also plank or replank, pave or repave, macadamize or remacadamize, reconstruct or repair, the said street between the rails of said track and for two feet on each side thereof, whenever directed to do so by the municipal authorities of the City of Portland.

(Duration.)

SECTION 3. All rights and privileges hereby conferred shall expire at the end of thirty three years from the date of the approval of this Ordinance.

(Acceptance.)

SECTION 4. A written acceptance of the terms of this Ordinance shall first be filed by the Northern Pacific Terminal Company of Oregon, with the Auditor and Clerk of said City before laying any track mentioned in this Ordinance, and within thirty days after the approval thereof.

SECTION 5. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Passed the Common Council January 4, 1899.

Approved January 9, 1899.

W. S. MASON, *Mayor*.

Approved by the Board of Public Works, January 9, 1899.
Acceptance filed February 1, 1899.

858 Mr. FENTON: I offer Ordinance No. 13054.

Objected to as incompetent, irrelevant and immaterial.

Objection over-ruled; exception saved.

Ordinance No. 13054 marked Complainant's Exhibit YYY.

COMPLAINANT'S EXHIBIT YYY.

Ordinance No. 13054. --

(Franchise Owned by the Northern Pacific Terminal Company.)

An Ordinance Authorizing the Northern Pacific Terminal Company of Oregon to Place a Side Track on Front Street.

The City of Portland does ordain as follows:

(Franchise—Route.)

SECTION 1. That the right and privilege be, and hereby is granted to the Northern Pacific Terminal Company of Oregon, a company duly incorporated and organized under the laws of the State of Oregon, to lay down, construct, maintain and operate a switch track of standard gauge, to connect with the present track of said company, on Front Street at a point in the center of said Front street at and near the point of intersection of the north line of Thurman Street with the west line of Front Street, and running thence northerly, curving to the right and along and parallel to the east line of Front Street, in front of river lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), and seven-

teen (17), in Watson's Addition to the City of Portland, a distance of about seven hundred and fifty (750) feet.

(Rails—How Laid—Streets to Repair.)

SECTION 2. Said switch track shall be laid as nearly as possible flush with the pavement or grade of said Front street and so
859 as not to obstruct or interfere with the public travel and traffic on the said street, and said The Northern Pacific Terminal Company of Oregon, shall, at all times while said switch track is so maintained, keep the street in good repair between the rails of said track and for two feet on each of the sides thereof, the same to be planked, paved, macadamized and improved whenever directed thereto by the municipal authorities.

(Operation of Cars.)

SECTION 3. The operation of cars over the switch track herein provided for shall be subject to the supervision and direction of the Committee on Streets and the City Engineer of the said City of Portland, and the right is herein reserved to cause The Northern Pacific Terminal Company of Oregon to remove said track and place said street in like condition as the same was before the construction of said track whenever the maintenance and operation of the same shall be or become in anywise contrary to the ordinance of said city, or to the interference with public travel and traffic upon said Front street.

(Acceptance.)

SECTION 4. A written acceptance of the terms of this Ordinance and an agreement to comply with the terms hereof shall be first filed by the said The Northern Pacific Terminal Company of Oregon with the Auditor of said city before laying any track mentioned in this Ordinance, and within thirty days after the approval thereof.

(Forfeiture.)

SECTION 5. A failure to lay all the track herein provided
860 for within six months from the date of the passage hereof shall at once, and without any act of the said city, forfeit all the rights and privileges granted herein.

Passed the Common Council, November 5, 1902.

Approved, November 11, 1902.

GEO. H. WILLIAMS, *Mayor*.

Approved by the Board of Public Works, November 18, 1902.
Acceptance filed, November 22, 1902.

Mr. FENTON: I offer Ordinance No. 13089.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception saved.

Ordinance No. 13089 marked Complainant's Exhibit ZZZ.

COMPLAINANT'S EXHIBIT ZZZ.

Ordinance No. 13089.

An Ordinance Granting to Portland Railway Company, Its Successors and Assigns, the Right to Construct, Acquire, and Own, and to Maintain, Operate and Use Railways and Poles and Wires and Underground Conduits, Cables, and Conductors in the City of Portland, Oregon.

The City of Portland does ordain as follows:

(Grantee—Franchise—Route.)

SECTION 1. That there be and hereby is granted, subject to the terms, restrictions, and provisions in this Ordinance contained, to Portland Railway Company, a corporation duly incorporated and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business at the City of
861 Portland, in the County of Multnomah in said state, and its successors and assigns, the franchise, right and privilege to lay down, relay, construct, reconstruct, purchase, acquire, lease repair, maintain, equip, operate, either have, hold, use, and enjoy lines of railway and a system of railways, either single track or double track, with power to change from one to the other, with convenient switches, turn outs, cross overs, curves, connections, and turntables, and to run and operate cars thereon, in, over, along, and upon the following named streets and highways in the City of Portland, Oregon, to-wit: Upon Washington street (or Washington street and the Barnes road if Washington street does not extend that far west), from First street to a point three hundred feet west of the east line of the City Park, and upon Twenty-third street from Washington street to Thurman street and upon Thurman street from Sixteenth street to the western or northwestern end of Thurman street, and upon Thirteenth street from Washington street to Montgomery street, and upon Sixteenth street from Washington street to Thurman street, and upon Nineteenth street from Thurman street to Sherlock avenue, and upon Sherlock avenue from Nineteenth street to Nicolai street, and upon Irving street from Sixth street to Fifth street, and upon Fifth street from Irving street to Sherman street, and upon Sherman street from Fifth street to Second street, and upon Second street from Sherman street to Sheridan street, and upon Sheridan street from Second street to First street, and upon First street from Sheridan street to Porter street, and upon Porter street from First street to
862 Corbett street, and upon Corbett street from Porter street to Grover street, and upon Grover street from Corbett street to Kelly street, and upon Kelly street from Grover street to the street, road, or highway known as the Macadam road, and upon Jefferson street from Fifth street to the western end of Jefferson street, and upon Chapman street from Jefferson Street to Elizabeth street, and upon Spring street from Chapman street to Twenty-

second street, and upon Ford street from Washington street to the south line of Jefferson street, and upon that certain street located between block numbered 56 and block numbered 59 in Carter's Addition to the City of Portland, from a point opposite the west line of lot numbered 24 in said block numbered 56 to the street or highway known as Market street drive, and upon said Market street drive from said street between said blocks numbered 56 and 59 to the street or highway known as Terrace road, and upon said Terrace road from said Market street drive to the connection of said Terrace road with Twentieth street, and upon Twentieth street from its connection with said Terrace road to a point seventy feet south of the south line of Spring street, and upon Elizabeth street from Chapman street to the Terrace drive, and upon the Terrace drive from Elizabeth street to Ravens View drive, and upon Ravens View drive from the Terrace road to the Patton road, and upon Twenty-fourth street from Thurman street to the street, road, or highway known as St. Helens road, and upon First street from Couch street to Jefferson street, and upon Burnside street from Washington street to the Willamette River, and upon East Burnside street from the Willamette river to East Tenth street, and upon Union avenue from East Burnside street to the north end of Union Avenue, and upon East Tenth street from East

863 Davis Street to East Pine Street, and upon East Pine Street from East Tenth Street to East Eighteenth Street, and upon East Eighteenth Street from East Pine Street to East Alder Street, and upon East Alder Street from East Eighteenth Street to East Twentieth Street, and upon East Twentieth Street from East Alder Street to East Salmon Street, and upon East Salmon Street from East Twentieth street to the eastern boundary line of the City of Portland, with the right to extend the same easterly upon East Salmon Street to the city boundary should the eastern boundary of the city be hereafter moved eastward, and upon Broadway Street from Union Avenue to East Nineteenth Street, and upon East Nineteenth Street from Broadway Street to Halsey Street, and upon Halsey Street from East Nineteenth Street to East Twenty second street, and upon East Twenty-second street from Halsey Street to Stanton Street, and upon Russell Street from Union Avenue to Gantenbein Avenue, and upon Gantenbein Avenue from Russell Street to Monroe Street, and upon Monroe street from Gantenbein Avenue to Commercial Street, and upon Commercial Street from Monroe Street to Shaver Street, and upon Shaver Street from Commercial street to Maryland Avenue, and upon Maryland Avenue from Shaver Street to the North line of North Albina Addition, and upon East Davis Street, from East Tenth Street to East Sixteenth Street, and upon East Sixteenth Street from East Davis Street to East Irving Street, and upon East Irving Street from East Sixteenth Street to the Sandy Road; And upon Alberta Street upon Union Avenue to the west line of the northeast quarter of section twenty three of township one north of range one east of the Willamette Meridian; and to connect together at street intersections by convenient curves, switches, turnouts, and connections all or any of the lines of railway in this section mentioned so as to conveniently operate the same as one entire system of rail-

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ways, and run cars from any line of track to any other line of track; and to connect together at street intersections by convenient curves switches, turnouts, and connections the lines of railway in this section mentioned and any other lines of railway in the City of Portland, and operate cars from one to the other; and to construct, maintain, and use convenient side tracks, switches, curves and turnouts from its lines of railway, maintained under authority of this Ordinance, to and upon its property and other rights of way and to and into its shops, barns, storehouses, repositories, depots, yards and terminal buildings and grounds and into the building upon lot 4 in block numbered 76 in East Portland; provided, that no track or tracks, or portion thereof, for entrance into its shops, barns, storehouses, repositories, depots or yards at Cedar Hill shall be constructed on Green Avenue within twenty four feet of the east line of Green Avenue.

* * * * *

(Duration of Franchise—Compensation Last Five Years.)

SECTION 14. All rights, privileges and franchises granted to or conferred upon said Portland Railway Company, its successors and assigns, by this Ordinance, shall continue, exist and remain in force until and including the thirty-first day of December, A. D., one thousand nine hundred and thirty two (1932). Said Portland Railway Company, its successors and assigns shall pay to the City of Portland, in the manner provided in section 11 of this Ordinance, the sum of twelve thousand dollars (\$12,000.00) for each of 865 the last five years of the existence of the rights granted by this Ordinance, to-wit, the years 1928 to 1932 inclusive.

* * * * *

Passed by the Common Council November 24, 1902.
Approved November 25, 1902.

GEO. H. WILLIAMS, *Mayor*.

Approved by the Board of Public Works, November 25, 1902.
Acceptance filed November 26, 1902.
Acceptance of Ordinance No. 13178, filed January 14, 1903.
Acceptance of Ordinance No. 13187, filed January 21, 1903.

Mr. FENTON: Ordinance No. 13177.

Objected to as incompetent, irrelevant and immaterial.
Objection over-ruled; exception saved.
Ordinance No. 13177 marked Complainant's Exhibit 4-A.

COMPLAINANT'S EXHIBIT 4-A.

Ordinance No. 13177.

(Franchise Owned by City & Suburban Railway Company.)

An Ordinance Granting to the City and Suburban Railway Company, its Successors and Assigns, the Right to Construct, Acquire, and Own, and to Maintain and Use Railways and Poles and Wires and Underground Conduits, Cables, and Conductors in the City of Portland, Oregon.

The City of Portland does ordain as follows:

(Grantee—Franchise—Route.)

SECTION 1. That there be and hereby is granted, subject to the terms, restrictions, and provisions in this Ordinance contained, to City and Suburban Railway Company, a corporation duly incorporated and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business at the City of Portland, in the County of Multnomah, in said state, and its successors and assigns, the franchise, right and privilege to lay down, relay, construct, reconstruct, purchase, acquire, lease, repair, maintain, equip, operate, have, hold, use, and enjoy lines of railway and a system of railways, either single track or double track, with power to change from one to the other, with convenient switches, turnouts, cross overs, curves, connections and turn tables, and to run and operate cars thereon, in, over, along and upon the following named streets and highways in the City of Portland, Oregon, to-wit: Upon Savier Street from Twenty-seventh Street to Fourteenth Street; and upon Fourteenth Street from Savier Street to Glisan Street; and upon Glisan Street from the Cornell Road to Third Street; and upon Twenty-first street from Glisan street to Northrup Street; and upon Northrup Street from Twenty-first street to Twenty-fifth street; and upon Twenty-fifth Street from Northrup Street to Raleigh Street; and upon Seventh Street from Glisan Street to Johnson street; and upon Third Street from Glisan Street to Sheridan Street; and upon Porter street from First Street to Front Street; and upon Flanders street from Third Street to First street; and upon First street from Flanders street to Whitaker street; and upon Grant Street from Third street to Front street; and upon Front street from Grant street to Gibbs street; and upon Gibbs street from Front street to Corbett street; and upon Corbett street from Gibbs street to Seymour Avenue; and upon Wisconsin street from Carolina street to Nebraska street; and upon and upon Nebraska street from Wisconsin street to Virginia street; and upon Virginia street from Nebraska street to Nevada street; and upon Second street from Flanders street to Grant street; and upon Nineteenth street from Glisan street to Mor-

rison street; and upon Morrison street from Nineteenth and Chapman streets to the Willamette river; and upon Yamhill street from Fourth street to Front street; and upon Front Street from Morrison street to Yamhill street; and upon Chapman street from Morrison street to Jefferson street; and upon Twenty-fourth street from Raleigh street to Thurman street; and upon Raleigh street from Twenty-third to Twenty-ninth street; and upon Eleventh street from Morrison street to Montgomery street; and upon Montgomery street from Eleventh street to Sixteenth street; and upon East Morrison street from East Twentieth street to the Willamette River; and upon Grant Avenue from Multnomah Street to Ellsworth street; and upon East Ankeby Street from Grand Avenue to East Twenty-eighth street; and upon East Twenty-eighth street from East Ankeny street to Weidler street; and upon Holladay Avenue from Grand Avenue to the Willamette River; and upon Multnomah street from Grand Avenue to East Fifteenth street; and upon East Fifteenth street from Multnomah street to Tillamook street; and upon Tillamook street from East Fifteenth street to East Nineteenth street; and upon East Davis street from Grand Avenue to East Ninth street; and upon East Ninth street from East Davis Street to East Glisan street; and upon East Glisan street from East Ninth street as it may be extended easterly, to East Twenty-eighth street; and upon A street from East Twenty-eighth street to the west line of T. Quinn donation land claim; and upon E street from East Twenty-eighth street, to Fulton street, and upon Fulton street from A street to E Street; and upon Williams Avenue throughout its entire length from Cherry street to the northern boundary of the city; and upon Quincy street from Cherry street to East First street; and upon East First street from Quincy street to Holladay Avenue; and upon Goldsmith street from Holladay avenue to Mississippi avenue; and upon Mississippi avenue from Goldsmith street to Prescott street; and upon Skidmore street from Mississippi avenue to Michigan avenue; and upon Michigan avenue from Skidmore street to Killingsworth avenue; and upon Dekum avenue from Williams avenue to Fern street; and upon Fern street from Dekum Avenue to Helm street; and upon Killingsworth avenue from Williams avenue to Greeley street; and upon Greeley street from Killingsworth avenue to Pippin street; and upon Pippin street from Greeley street to Wabash Avenue; and upon Dawson street from Huron street northerly to the city limits; and upon East Harrison street from Grand Avenue to East Twelfth street; and upon East Seventh street from East Harrison street to East Sherman street; and upon East Sherman street from East Seventh street to East Twelfth street; and upon East Twelfth street from East Harrison street to Clinton street; and upon Clinton street, as it may be extended, from East Twelfth street to the eastern boundary of the city; and upon East Twenty-first street from Powell street to Hood street; and upon East Twenty-sixth street from Clinton street to Powell street; and upon Kern street from East Twenty-sixth street to East Thirty-seventh street; and upon East Thirty-seventh street

869 from Kern street to Clinton street; and upon Ellsworth street from Grand Avenue to East Tenth street; and upon East Tenth Street from Ellsworth street to Brooklyn street; and upon Brooklyn street from East Tenth street to Powell street; and upon Powell street from Milwaukee street to East Twenty-first street; and upon Hood street from East Twenty-first street to East Twenty-second street; and upon East Twenty-second street from Hood street to Coquille street; and upon Coquille street from East Twenty-second street to Francis Avenue; and upon Francis Avenue from Bryant street to Tait street; and to connect together at street intersections by convenient curves, switches, turn outs and connections, all or any of the lines of railway in this section mentioned, so as to conveniently operate the same as one entire system of railways, and run cars from any line of track to any other line of track; and to connect together at street intersections by convenient curves, switches, turn outs and connections, the lines of railway in this section mentioned, and any other lines of railway in the City of Portland, and operate cars from one to the other; and to construct, maintain, and use convenient side tracks, switches, curves, and turn outs, from its lines of railway maintained under authority of this Ordinance, to and upon its property and other rights of way, and to and into its shops, barns, storehouses, repositories, depots, yards, and terminal buildings and grounds.

* * * * *

(Duration of Franchise.)

SECTION 14. All rights, privileges and franchises granted to or conferred upon said City and Suburban Railway Company, its successors and assigns, by this Ordinance, shall continue, exist
870 and remain in force until and including the thirty first day of December, A. D., one thousand nine hundred and thirty two (1932).

* * * * *

Passed the Common Council January 9, 1903.

Approved January 13, 1903.

GEO. H. WILLIAMS, *Mayor*.

Approved by the Board of Public Works, January 14, 1903.

Acceptance filed, January 14, 1903.

871 Mr. FENTON: I offer Ordinance No. 6098.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception saved.

Ordinance No. 6098 marked Complainant's Exhibit 4B.

(From Compilation of 1895.

COMPLAINANT'S EXHIBIT 4B.

Ordinance No. 6098.

An Ordinance Authorizing the Mt. Tabor Street Railroad Company, Their Successors or Assigns, to Construct, Maintain and Operate a Street Railway in the City of Portland, Multnomah County, State of Oregon.

The City of Portland does ordain as follows:

Franchise—Route.

SEC. 1. That there be and hereby is granted unto the Mt. Tabor Street Railroad Company, their successors or assigns, the right and privilege to lay down, maintain and operate an iron or steel railroad track or tracks and to operate a street railway within the city of Portland, from and upon and over the following streets, to-wit: Beginning at the intersection of Madison street with Seventh and extending thence easterly along Madison street to the Willamette River, and for that purpose to erect necessary poles and stretch wires, subject, however, to regulation by the common council.

* * * * *

Duration of Franchise.

SEC. 15. All rights and privileges hereby conferred shall expire at the end of thirty years from the date of the approval of this ordinance.

Approved February 14, 1890.

872 Mr. FENTON: I offer ordinance No. 7574.
(Compilation of 1895.)

Objected to as incompetent, irrelevant and immaterial.
Objection overruled; exception saved.

Ordinance No. 7574 marked Complainant's Exhibit 4C.

COMPLAINANT'S EXHIBIT 4C.

Ordinance No. 7574.

An Ordinance Granting to the Portland and Vancouver Railway Company the Right to Construct and Operate a Street Railway upon Certain Streets in the City of Portland.

The City of Portland does ordain as follows:

SEC. 1. That there be and is hereby granted unto the Portland and Vancouver Railway Company, its successors and assigns, the right and privilege to lay down, maintain and operate an iron or steel railway track or tracks and to operate a street railway within

the city of Portland, along, upon and over the following streets, to-wit:

Beginning at the intersection of Killingsworth Avenue with Union Avenue and extending easterly along said Killingsworth Avenue to the east boundary line of said city. Said street railway to connect with the line of said Portland and Vancouver Railway now constructed and operated over and upon said Union Avenue.

* * * * *

Duration of Franchise.

SEC. 16. All rights and privileges hereby conferred shall expire at the end of thirty years from the 24th day of April, 1888.

Approved April 23, 1892.

873 Mr. FENTON: I offer Ordinance No. 7984.
(Compilation of 1895.)

Objected to as incompetent, irrelevant and immaterial.

Objection overruled; exception saved.

Ordinance No. 7984 marked Complainant's Exhibit 4D.

COMPLAINANT'S EXHIBIT 4D.

Ordinance No. 7984.

An Ordinance Authorizing the City and West Portland Park Motor Company, its Successors and Assigns, to Construct, Maintain and Operate Street Railways on Certain Streets in the City of Portland, Multnomah County, State of Oregon.

The City of Portland does ordain as follows:

Franchise—Route.

SEC. 1. That there be and is hereby granted unto the City and West Portland Park Motor Company, its successors and assigns, the right and privilege to lay down, maintain and operate an iron or steel railroad track or tracks, and to operate a street railway within the city of Portland, along, upon and over the following streets, to-wit:

Commencing at the city boundary line, at the west end of Hamilton Avenue, running thence easterly along said Hamilton Avenue to Front street; thence northerly, following the center line of Front street to Whitaker street; thence west on Whitaker street to the center line of First street; provided, that nothing on this ordinance shall be construed to authorize the erection of poles or of any obstruction in any street in the city of Portland, between the curb lines thereof, except overhead wires which shall be subject to the approval of and regulation of the common council.

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* * * * *

Under the city charter violation of an ordinance is punishable by fine in any sum not exceeding \$500, whereas under this Ordinance No. 16491, a fine cannot be imposed *less than \$250*, and besides, the said ordinance further provides for a punishment for each day's running or operating, or attempting to run or operate such steam locomotives or freight cars, and also in the conjunctive, imposes the further penalty of a forfeiture of all rights and privileges claimed by the Oregon Central Railroad Company with respect to the operation of said railway on said street. That is to say, Ordinance No. 16491 provides a punishment by fine of not less than \$250 nor more than \$500, or by imprisonment for not more than six months or by both such fine and imprisonment, *and a forfeiture of the rights and privileges claimed by the railway company.*

Under the authorities this ordinance is absolutely void, because it provides for a greater and different penalty than that authorized by charter. It cannot be claimed that this ordinance is void only as to the fine sought to be imposed, and valid as to the other punishment, because if the fine is eliminated then the ordinance would impose a greater penalty than allowed by the charter. That is to say, the municipal court could not punish a violation of this ordinance by a fine only, but would be compelled to imprison for a violation thereof for a term of not more than six months, and the imposing of such sentence would, under the terms and provisions of

the ordinance, work a forfeiture of all rights and privileges claimed by the said Oregon Central Railroad Company.

The portion of this ordinance in relation to the removal of freight cars from the street is so intimately interwoven and connected with that portion in relation to the operation of cars by steam, that they cannot be separated and stand. So in relation to the penalty. If it should be held that the penalty of the fine of not less than \$250 and not to exceed \$500 is void, such penalty could not be separated from the punishment by imprisonment, for the reason that such separation would make the punishment greater and different from that allowed by the charter. The rule is elementary that where a part of a by-law or ordinance is void, another essential and connected part of the same by-law or ordinance is also void.

Dillon on Municipal Corporations, Sec. 421
and cases cited in the notes. (4th Ed.)

In conclusion, we submit that a franchise of a railroad to operate its trains on the streets of a city, when accepted and acted upon as in the case at bar, becomes an irrevocable contract and vested right, and cannot be divested except in some proceeding under the sovereign power of the state in the nature of condemnation proceedings, and then it cannot be taken away without compensation being paid therefor. A franchise cannot be taken or confiscated by a city under the guise of the police

power. Neither can the city deprive a railway company of its franchise under an ordinance declaring it a nuisance and permitting punishment therefor. A charter conferring upon a city the power to designate what shall constitute a nuisance, does not authorize it to declare a particular use of the property a nuisance which is not within the common law or statutory definition of nuisance. *Grossman v. City of Oakland*, 30 Or. 478; *Ex parte Wygant*, 39 Or. 429.

"Railroad corporations, and others invested with the power of eminent domain, because their business is of public utility, may be subjected to such regulations in regard to their charges and the conduct of their business as the legislature deems wise and proper for the general good. They may be compelled to adopt such appliances and execute such additions or changes in their works or property and take such precautions as are necessary to the public safety. Beyond this, private property cannot be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made."

Lewis on Eminent Domain, Sec. 249 (3rd Ed.)

Central Bridge Corp. v. City of Lowell, 70 Mass. 480.

ARGUMENT

I.

It may be assumed that the material issues of facts alleged in the bill of complaint have been fully sustained by the evidence. We deny that any facts pleaded by the city, or proven under the evidence,

justify the adoption of Ordinance No. 16491, or that in the exercise of the police power, such ordinance could be legally enacted. The questions involved in the case at bar are therefore merely questions of law.

It is a sufficient answer to the contention of fact made by the city, that the operation of steam engines or freight trains over Fourth Street is a menace to the lives, health, and safety of the public, that the proof shows that there has not been during nearly forty years operation, a single casualty resulting from or occasioned by the presence of this railroad on Fourth Street. Two accidents resulting in personal injury have occurred, but in both cases they were caused by the drunken condition of the parties injured or killed. There have been a few slight collisions with vehicles or teams, resulting from the casual or careless collision of the owners or drivers of such vehicles, with passing engines or trains. The proof shows conclusively that thousands of pedestrians, and hundreds of teams, have passed and repassed over and along Fourth Street for nearly forty years, and it therefore cannot be said that the legislation sought to be justified is supported by any finding of fact that the operation of these trains, or of steam engines, is or was dangerous to the lives, safety or health of the public; nor can it be said that the proof shows that the operation of steam engines or freight trains is in any sense a nuisance on account of smoke, dust, or

noise. Indeed, if the operation of such locomotives or freight trains could by any possibility be declared by legislation to be a nuisance, that is not what has been attempted by the legislation sought to be enacted by the provisions of Ordinance No. 16491. It is apparent, and must be apparent to the court, that Ordinance No. 16491 is a clumsy attempt by the city, under delegated legislative authority under its present charter, to amend or repeal substantially the material portion of Ordinance No. 599, passed pursuant to the direct authority of the legislature as expressed by Sections 6841 and 6842, Lord's Oregon Laws, in effect since October 14, 1862. The attempt of the city to exercise its delegated legislative power in the passage of Ordinance No. 16491 is justified upon the alleged ground that Ordinance No. 599 is a revocable permit or license, and is not a franchise which is or could be irrevocable and perpetual; that it is not upon its face assignable, and that it could only inure to the benefit of the Oregon Central Railroad Company during the pleasure of the city, and that its successor and vendee, the Oregon & California Railroad Company, and the lessee of that company, the Southern Pacific Company, could not in any way acquire any right under the provisions of Ordinance No. 599. These contentions, as we hope to show, are all, and each of them is, untenable.

Preliminary to the discussion of the first question, it may be observed that Ordinance No. 16491 recog-

nizes on its face the right to operate steam locomotives and freight cars on Fourth Street, between Glisan Street and the southerly limits of the City of Portland, at the time of its passage, and for eighteen months thereafter. By Section 1 it is expressly provided:

"It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their *lessees* * * * to run or operate steam locomotives or freight cars over, upon or along Fourth Street, * * * from and after eighteen months from the final passage or approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street."

By Section 2, it is provided:

"Any violation of the provisions of this ordinance by the owners, officers, agents, or employes of said Oregon Central Railroad Company, or its successors, assigns, or *lessees*, * * * by so running or operating steam locomotives or freight cars * * * or attempting to run or operate the same on said Fourth Street, shall be punishable by fine. * *"

Thus by the first and second sections of this ordinance the city recognizes that the operation of steam locomotives and freight trains on Fourth Street was lawful on that date, and would be for eighteen months thereafter; that the Oregon Central Railroad Company was in existence, and had successors and assigns, and lessees, who were operating steam locomotives and freight cars over Fourth Street,

and would be so operating the same lawfully for eighteen months thereafter, and that the ordinance attempts by Sections 2, to denounce a penalty against the officers, employes and agents of the Oregon Central Railroad Company, or its successors, assigns or lessees.

It is thus manifest, notwithstanding the provisions of Section 3, that the city, by this ordinance, has expressly recognized the assignability of the franchise or right granted by Ordinance No. 599, and the right of Southern Pacific Company, as lessee, in succession to the same. In addition to this affirmative recognition contained upon the face of the repealing ordinance, the proof shows to a demonstration that the Oregon Central Railroad Company accepted the terms and provisions of Ordinance No. 599, made the improvements required by its terms, and that since October 6, 1880, when the Oregon & California Railroad Company succeeded to the property of the Oregon Central Railroad Company, under authority to dissolve the latter company and dispose of its assets, conferred by Sections 5068, 5070, Bellinger & Cotton's Annotated Code, and up to July 1, 1887, continuously operated the railroad over and along Fourth Street, renewed and rebuilt the same, and repaired the street, as required by this ordinance, and was recognized by the city, by ordinance and otherwise, and that since July 1, 1887, the Southern Pacific Company has continuously, under its lease, operated this railroad on

Fourth Street, made the improvements required by Ordinance No. 599, and has been recognized by the City of Portland in every possible way, by ordinance, by assessment and taxation, and by requiring of the Southern Pacific Company full performance of all the terms and conditions of this ordinance, and by the enactment of other ordinances for its benefit, referring to and connected with and in recognition of the rights and obligations created under Ordinance No. 599.

It will be remembered, also, from an examination of the repealing ordinance, that it not only prohibits the operation of steam locomotives *at any time, under any circumstances*, but it *prohibits the movement of freight cars over or upon Fourth Street*, and thereby, if valid, deprives the railroad company of an opportunity to perform its duty as a common carrier of freight, or to use the motive power in question *at any time or place*, over Fourth Street, and prohibits the movement of any train, including passenger trains, by the use of steam locomotives and *does not offer by the terms of such ordinance, any substitute motive power, or confer any right upon the company to transact its business in any way upon said street*. It is not a regulation, nor is it claimed to be a regulation or a limitation of the time or times when steam locomotives might be operated over this street, or when freight trains might be moved in the usual course of the business of the carrier. Nor does the ordinance attempt to

forfeit or declare a forfeiture of the rights and privileges granted by Ordinance No. 599, and, *as a consequence of such forfeiture*, attempt to require the removal of the railroad from the street.

It is not claimed that under the provisions of Section 3, of Ordinance No. 599, that the city, under Ordinance No. 16491, has attempted to make or alter any regulations for the conduct of the road, or to regulate the speed of the railway cars or locomotives, nor is it claimed by this repealing ordinance that the city has attempted to "restrict or prohibit the running of locomotives at such time and in such manner as the city may deem necessary;" but the city asserts, by the ordinance in question, that it may prohibit the running of locomotives and freight trains *at all times, and absolutely.*

It is of course elementary that Ordinance No. 16491, attempting as it does, to prohibit the movement of freight trains at all, and to prohibit the use of steam locomotives at all times, must be read as an entirety, and that the whole of the ordinance must stand or fall; a part of it cannot be considered valid, and a part invalid, because it is impossible to separate its terms or provisions.

With this full general statement of the issues, both of law and of fact, we proceed with the discussion of the legal principles involved.

The Oregon Central Railroad Company was incorporated November 20, 1866, and its Articles filed in

the office of the County Clerk of Multnomah County, Oregon, November 23, 1866, and its duration is unlimited. (Pages 249-251 Transcript) At the time of its incorporation the charter of the City of Portland then in effect was the Act of October 14, 1864, (Pages 64-88 Transcript) which did not confer any power or authority upon the Common Council in respect to railroads in streets, and the power in that respect was dependent upon the provisions of Sections 24 and 25 of the Act of October 14, 1862, now Sections 6841 and 6842 Lord's Oregon Laws. Page 6 Transcript) This was the condition of the law on January 6, 1869, when the Oregon Central Railroad Company attempted to bring itself within the provisions of the state statute, and when the City of Portland attempted to consent to the exercise of that power by the railroad company.

On October 6, 1880, when the Oregon Central Railroad Company conveyed to the Oregon & California Railroad Company all of its property of every kind and nature, including its rights under the provisions of the state law, as evidenced by Ordinance No. 599, in respect to the use of this street, Sections 5068 and 5070 of Bellinger & Cotton's Code were as follows:

"Section 5068. All corporations that expire by limitation specified in their Articles of Incorporation, or are dissolved by virtue of the provisions of Section 5070, or are annulled by forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending

actions, suits, or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business."

"*Section 5070.* Any corporation organized under the provisions of this chapter may, at any meeting of the stockholders, which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business and disposing of its property, and dividing its capital stock in any manner it may see proper."

Section 5068 was Section 17 of the Act of October 14, 1862, and Section 5070 was Section 19 thereof.

Under this state of the law it is clear that the City of Portland, under its charter of January 23, 1903, in effect when Ordinance No. 16491 was passed, had no power or authority to amend, modify or repeal the rights granted under the Act of the Legislative Assembly of October 14, 1862, and particularly under the provisions of Sections 24 and 25 thereof, being now Sections 6841 and 6842 of Lord's Oregon Laws, *supra*. An examination of these sections shows clearly that the Legislative Assembly undertook to grant to railroad companies the absolute and unqualified right on the part of such railroad companies, to appropriate any part of any public street, wheresoever situated, whether within or without the corporate limits of a municipal corporation, and granted plenary power to the municipal corporation to agree with the railroad company

upon the extent, terms and conditions upon which such street might be appropriated or used and occupied, and in case such parties should be unable to agree, the legislature granted, unconditionally, to such railroad company, authority to appropriate so much of such street as might be necessary and convenient in the location and construction of the road.

This was a direct exercise of the legislative authority having primary and sovereign control of the streets and highways of the state, in behalf of an enlarged public use of such street for public purposes, such as the exercise of the functions of a railroad company in the carriage of freight and passengers in the performance of its public duties required, and it is apparent that such right when exercised by the railroad company, became a vested property or contract right, to continue as long as the public functions of such carrier should be exercised, either by the carrier directly, or by its assigns or lessees, under the provisions of law permitting such railroad company to dispose of its railroad to another railroad company, either by dissolution of such corporation and the sale of its property, under Sections 5068 and 5070 of Bellinger & Cotton's Code, *supra*, or the leasing of its railroad and property pursuant to Subdivision 7, of Section 6686, Lord's Oregon Laws, under which Southern Pacific Company was authorized to accept a lease of the railroad and properties of the Oregon & California Railroad Company.

It is fundamental that control of streets and highways, whether within or without the limits of a municipal corporation, is in the state, represented by the legislature.

"The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the tendency of more recent judicial opinion) to certain private and property rights and easements of the abutting owner, full and paramount authority over all public ways and public places."

3 Dillon on Municipal Corp. Sec. 1122, 5th Ed.

"By virtue of its authority over public ways, the legislature may authorize acts to be done in and upon them, or legalize obstructions therein, which would otherwise be deemed nuisances. As familiar instances of this may be mentioned the authority to railway, water, telegraph, and gas companies to use or occupy streets and highways for their respective purposes."

3 Dillon on Municipal Corp. Sec. 1128, 5th Ed.

"As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may legitimately be put, depends, within constitutional limitations, entirely upon their charters or the legislative enactments applicable to them."

3 Dillon on Municipal Corp. Sec. 1161, 5th Ed.

This legislative power, under a state statute such as Sections 6841 and 6842 Lord's Oregon Laws, *supra*, is the exclusive act of the state, notwith-

standing the statute may require or permit the municipality to consent to the exercise of such right. Under Section 6842 the right *was made absolute even though the city or municipality might refuse to give its consent*. Such consent, therefore, when given, is merely in furtherance of the legislative grant, and when once exercised, cannot be recalled, modified or withdrawn. This is particularly true where, as here, the consent was not necessary.

"Although the franchise or right to use the streets of a city is derived from the state acting through the legislature, the consent of the municipality *when required by constitution or by statute* must be obtained before the right to exercise the franchise is complete."

3 Dillon on Municipal Corp. Sec. 1226, 5th Ed.

"No particular mode of manifesting the municipal consent to the construction of a railroad or other public utility in the city streets is prescribed by the usual constitutional provision, and in such case it has been said that so far as the Constitution is concerned, such consent may be either express or implied. And it has also been held that the consent of the municipality required by statute may be presumed where the streets of the municipality have been used for a long period of years by the company under such circumstances as to amount to a claim of the right to use them."

3 Dillon on Municipal Corp. Sec. 1227, 5th Ed.

"Although the legislature may be prohibited by constitutional provisions from authorizing the construction of a street railroad, or telegraph or telephone line, or other structures in the streets for the public service, without the consent of the municipality, the franchise or

right to use the streets therefor flows from the State, and not from the municipality. A constitutional requirement that no street railroad, telegraph or telephone line, or other public utility, shall be constructed within the limits of any city without the consent of the local authorities, is *not a grant of authority* to the municipality to create and grant franchises in streets. It is a restriction on the legislature only, and the municipality still requires legislative authority to enable it to make an effective grant or to give its consent."

3 Dillon on Municipal Corp. Sec. 1228, 5th Ed.

"But it is apparent that there is a limit to, or qualification of the character of, the conditions which may be imposed by the municipality. Although the statute or constitutional provision may simply require the consent of the municipality, it is usual to give that consent in the form of an ordinance containing stipulations and conditions; and such ordinance with its stipulations and conditions becomes a part of the contract under which the right to use the street arises. These conditions and stipulations may be of such a nature as to operate as a restriction or qualification of the powers of the municipality as well as a qualification or restriction of the right granted. So viewed, such conditions or restrictions must not infringe certain fundamental principles of municipal law. Thus, it has been recognized that conditions attached by the municipality may be unlawful because they require the performance of a forbidden act, or because they wholly transcend the scope of the authority conferred upon the municipality; and it has been held that the municipality has not the power, in giving its consent to the construction of a street railroad, to contract away or limit the taxing or police powers of the legislature. Some

courts have gone further and have limited the power of the municipality to attach conditions to its consent to such conditions as materially affect, or relate to the powers of government which are conferred upon the municipality by its charter, or by statute. And in those jurisdictions in which a limit to the power of the municipality to attach conditions is recognized, the attempt to impose an unlawful or invalid condition is regarded as a mere nullity, and the validity of the consent or franchise is not affected thereby."

3 Dillon on Municipal Corp. 5th Ed. Sec. 1229.

"When the legislature has regulated the terms and conditions upon which the streets of the municipality may be used by a railroad or other public service corporation, the city council or other officials charged with the duty of giving municipal consent to the construction of the public utility *cannot impose other or different conditions* which are inconsistent with those prescribed by the legislature."

3 Dillon on Municipal Corp. 5th Ed. Sec. 1230.

This is particularly true where, as here, the authority to construct a railroad under the Articles of Incorporation of the Oregon Central Railroad Company was granted by the state, and where, as here, that railroad had its northern terminus at the north end of Fourth Street, at its intersection with Glisan Street, and its southern terminus, by way of Fourth Street to Sheridan Street, where Fourth Street ends, and thence over private right of way acquired by the company by condemnation or purchase, to a point at or near McMinnville, on the

Yamhill River; and where, as here, this railroad, under the Act of Congress of May 4, 1870, (16 Statutes at Large, 94) is performing certain public functions devolved upon it by Congress, and where, under the state statute as well as under the Act of Congress and the Articles of Incorporation, this railroad presumably must be operated in perpetuity.

It was the legislative intent, as expressed by the provisions of Sections 6841 and 6842 Lord's Oregon Laws, to encourage the building of railroads, and to that end to grant to railroad companies the right to appropriate any part of any public street within the limits of a municipal corporation, and legislative authority was granted by which such municipal corporation—it may be conceded—was authorized to agree with the railroad company upon the extent, terms and conditions upon which any street might be appropriated, used, or occupied, and if such parties could not agree on the extent, terms and conditions upon which the street might be appropriated, used or occupied, then the railroad company could appropriate so much of such street as might be necessary and convenient in the location and construction of the road. It was obligatory upon the railroad company to locate its road upon such street within the corporate limits as the local authorities having charge thereof should designate, but if such local authorities, in this instance the Common Council, should fail or refuse to make such designation within a reasonable time, when

requested, the railroad company might make such appropriation without reference to the local authorities. It was the clear legislative intent that the appropriation of so much of any street within the corporate limits as might be necessary or convenient, should be easily and quickly effected, and that the local authorities either could agree with the railroad company upon the extent, terms and conditions of such use, or could, when requested by the railroad company, designate the street upon which the railroad should be located, and if such local authorities should fail or refuse to make such designation within a reasonable time, when requested, the railroad company might make such appropriation without action upon the part of the Common Council.

In this instance it will be presumed that the railroad company requested the Common Council to designate the street, and to state the extent, terms and conditions upon which Fourth Street could be used, appropriated or occupied, and that Ordinance No. 599, when accepted by the railroad company, became a contract or agreement between the state and the railroad company, acting by and through the Common Council, pursuant to legislative authority. Thereafter the Common Council had no power to impose any other conditions or terms, or to repeal or modify the conditions or terms as expressed in Ordinance No. 599.

It may be conceded that this contract thus evi-

denced does not deprive the state of its right, in the exercise of its police power, directly or indirectly, through the Common Council, under a delegated authority, to enact reasonable regulations under which the rights evidenced by the contract could be exercised by the railroad company. But no exercise of such police power could impair, modify or destroy the special terms of the agreement, and the Legislative Assembly could not, by subsequent legislation, delegate to the city authority to repeal, amend or modify the terms of this agreement. And therefore the provisions of the charter of the City of Portland, enacted by the Legislative Assembly of the State of Oregon on January 23, 1903, and particularly Section 103 of this charter, (Pages 12, 431, 432, 433 Transcript) could not confer power upon the City of Portland to abrogate, annul or modify the rights granted to the railroad company under the state statute, Sections 6841 and 6842 Lord's Oregon Laws, evidenced by the passage of Ordinance No. 599.

In *Abbott et al. v. City of Duluth*, 104 Fed. 833, the court, speaking of a legislative grant to a telephone company, accepted by it, to construct, operate and maintain a telephone line, and to erect poles therefor in the streets of a city, says:

"The rights and powers granted thereby became contract rights in the company as fully as if the amendment had been enacted and in force when the company was organized and incorporated. These rights and powers, being

unlimited in respect to duration, were valuable property rights, not merged nor excluded by the special acts referred to, which granted in addition the exclusive monopoly of occupying the streets, etc. of Duluth, and later of West Duluth, with telephone poles and wires for a limited time. This monopoly, which was the only real grant made by the special acts, ceased with the lapse of the prescribed time; but the unlimited right to occupy the highways of the city remains and continues. The acceptance by the company of the special exclusive rights granted by the special acts for a fixed time, and presumably of value, cannot be construed as a refusal, disclaimer, or surrender of the rights and powers granted to and vested in the company by the general law."

In that case it was contended that although the company had obtained a grant under *a state statute, unlimited in time*, the acceptance of further grants under special statutes, where the rights granted were limited in time, was a waiver of the rights vested in the company under the general statute, and that the special acts would operate to repeal by implication, the general statute upon that subject. This case is to the point, as to the assignability of the contract rights created under the state statute, the perpetuity thereof, and that subsequent special statutes cannot impair or modify or repeal the right granted in the first instance, under the general law.

In *Sunset Telephone & Telegraph Co. v. City of Pomona*, 172 Fed. 829, 837, the court says:

"Taking section 536 of the Civil Code of California as originally enacted as including telephone as well as telegraph companies, as

we think must be done in view of the decisions of the Supreme Court of the state to which reference has been made, it cannot be doubted that the erection by the appellant of its poles and wires in Pomona in the year 1889, and their maintenance and operation, was an acceptance by it of the provisions of that statute, which thereby became a contract between the company and the state, secured by the Constitution of the United States against impairment by any subsequent state legislation."

City of Columbus v. Street Ry. Co., 137 Fed. 869, 873

City of Wichita v. Old Colony Trust Co., 132 Fed. 641, 645

In State ex rel Wisconsin Tel. Co. v. City of Sheboygan, 111 Wis. 23, 35, the court says:

"The city had no power to add to or detract from it except in the exercise of its police power. The franchise existed by express legislative grant. Its exercise might be controlled only *in recognition of its existence*, and in conformity with a just and reasonable administration of the police power in the interest of the city and its inhabitants. In a sense, the city was called upon to grant a privilege. It had the power to regulate the use of its streets. It might deem it improper to allow poles to be set along some of the streets included in the proposed extensions. It might designate other streets, and thus exercise a reasonable discretion in the interests of its people. But such privilege was controllable only in harmony with the rights both possessed. In no proper sense was the privilege sought a franchise, within the meaning of Section 940b. The consent of the city was only required or asked in view of its right to regulate."

This was stated in a case where, as here, the state statute granted to the telephone company the right to use the streets, and where the state statute expressly provided that no such line should at any time obstruct or incommode the public use of the particular highway.

Wisconsin Tel. Co. v. City of Oshkosh, 62
Wis. 32

In Township of Summit v. N. Y. & N. J. Tel. Co.,
57 N. J. Eq. 123, 127, the court says:

"The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the proviso annexed to the grant that the use should be subject to such regulations and restrictions as may be imposed. The restrictions intended in such a proviso must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use or impose new conditions to the power to exercise the franchise. A power to 'regulate and control' the driving of cattle in streets does not give power to prevent it altogether. *McConvill v. Jersey City*, 10 Vr. 38, 44 (Supreme Court, 1876). Such power of prohibition, or of imposing conditions upon which the franchise should be exercised at all, was not vested in the township authorities by the statute, nor can the township committee, by its own ordinance, confer upon itself this power or the absolute right of previous consent. An ordinance imposing a new condition upon which the telephone company may use its franchise in or over the public streets, granted by the legislature, is an entirely different thing from an ordinance regulating and restricting

the manner of erection and use in or over the streets. The effect of such ordinance is to interdict the enjoyment by the company of its franchise except upon terms and conditions which the legislature, in its charter, has not imposed. * * * * *

"The right of the company to the use of the streets for the mere suspension of wires over them, is based on the authority expressly given by the legislature to use the highways for erecting poles to sustain wires, and on the consent of the owner of the soil; and this use is not, by the statute, made subject to the mere discretion of the municipal authorities. They can only regulate and restrict it by reasonable regulations."

In *New Hope Tel. Co. v. City of Concordia*, 106 Pac. Rep. 35, the Supreme Court of Kansas expresses the true rule as follows:

"Repeals by implication are not favored, and as these acts taken together, admit of a construction that the state had directly granted telephone companies the right to build over the streets of cities subject to such reasonable regulation as the council may prescribe, that construction should be adopted. No company should undertake to enter a city and erect poles and string wires over or along streets, alleys, or public grounds, without making application and a proper effort to procure the passage of an ordinance defining the manner and place of construction of the contemplated lines. Such an application the council may not deny. It may regulate, but not exclude. The telephone companies get the right directly from the state, and not from the city. The city may prescribe terms and conditions upon which the right granted by the state shall be exercised, but it

has no power to annul the right granted by the higher authority," citing many cases.

In *Telephone Company v. City of St. Joseph*, 121 Mich. 502, 509, the court says:

"When the construction company and the complainant accepted the privileges granted to them by the laws of the state, and the municipality had duly given its permission, and the corporations had expended their money in valuable improvements, contracts were entered into which neither the state nor the municipality could impair or destroy, in the absence of power to do so being reserved in the grant itself, or in the constitution, which becomes a part of all such contracts. The constitution and the statute clothe municipalities with power to control their streets and alleys, and protect them from things injurious and dangerous to the public; hence they have the power to make all reasonable rules and regulations for erection and maintenance of poles and wires for telegraph and telephone companies. Here their power in the matter ceases. * * *

"The question is not, as counsel for the defendant state, the right to regulate the use of its public streets. This right is conceded by the complainant, and in the petitions it presented to its common council. The action of the council is practically prohibitive of the use of the streets. The defendant city, by its act of incorporation, obtained no other or greater rights or control over the complainant than the village had over it and its assignor. Both, under the police power inherent in municipalities, possessed the right of reasonable regulation."

Michigan Tel. Co. v. City of Benton Harbor,
121 Mich. 512

In *Village of Carthage v. Central N. Y. Tel. Co.*, 185 N. Y. 448, 452, the court says:

"The legislature having granted these corporations the right to construct and maintain their lines upon, over or under any public roads, streets and highways, it sought to confer upon the boards of trustees of villages the power to regulate the erection of telegraph, telephone or electric light poles, or the stringing of wires, in, over or upon the streets, etc. it is clear that the intention of the legislature was to permit villages to regulate the erection of telegraph, telephone or electric light poles and the stringing of wires on these poles. The right to erect these poles and string the wires is not derived from the village authorities, but they are permitted to regulate the erection of the same; that is to say, the location of the poles and the streets to be occupied are, doubtless, within the reasonable power of the village to regulate."

And so under the provisions of Sections 6841 and 6842 Lord's Oregon Laws, *supra*; the state granted the right to the railroad company to appropriate so much of Fourth Street as may be necessary and convenient in the location and construction of the road, and this right could be exercised by the railroad company without the consent of the municipality, but when exercised, the municipality, whether it consented to the location or not, could, under the police power, reasonably regulate the use of such street by the railroad company, but it could not materially impair or destroy that use under the guise of reasonable regulation, or under the pretense that it was within the police power.

Judicial expression of this rule is well stated in *Northwestern Tel. Exchange Co. v. City of Minneapolis*, 81 Minn. 140, 146, where the court says:

"That the effect of the first ordinance, and the acceptance and expenditures of large sums of money by plaintiff in reliance thereon, established such contractual rights between the parties, we have no right to question, either upon principle or authority. An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which require the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation which relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured. It is protected by the organic law which forbids the impairment of contracts or interference with vested rights without due process of law. *Cincinnati v. Smith*, 29 Oh. St. 291; *Chicago v. Sheldon*, 9 Wall. 50; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273; *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 567, 17 Sup. Ct. 653; *Cincinnati v. Village*, 36 Oh. St. 631, 634; *City v. Great Southern*, 40 La. An. 41, 3 South. 533; *City v. Burlington*, 49 Iowa, 144; *Com. v. City*, 97 Mass. 555; *City v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458. These are but a few of the many authorities which clearly enunciate the rule above stated, the reason for which is founded upon the most obvious principles of justice, as well as sound policy and public necessity; for no one would invest his money to further any plan of improvement for his own as well as the general benefit if the rights

to the advantages which he as its promoter expects to derive from its success might be destroyed by the uncertain or capricious inclinations of the governing body of the municipality."

In *Mayor etc. of Knoxville v. Africa*, 77 Fed. Rep. 501, 507, Lurton, Circuit Judge, speaking for the Circuit Court of Appeals, Sixth Circuit, aptly says:

"Under the well-settled law of Tennessee the power to grant to a public corporation a right of way for the operation of public railroads, commercial or street, on or over a particular street or public highway, resides primarily in the legislature of the state, but may be delegated to municipal governments. *Railroad Co. v. Adams*, 3 Head, 598; *Railroad Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705; *Dill. Mun. Corp. Secs.* 519-521. The restrictions imposed by the amendments to the constitution adopted in 1870, whereby the legislature is required to provide for the organization of corporations by general law only, would perhaps prevent the granting of a particular right of way to a particular corporation, as was done in the charter construed in *Railroad Co. v. Adams*, 3 Head, 598. A right of way upon a public street, whether granted by act of the legislature, or ordinance of city council, or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale, and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts. *City of Detroit v. Detroit Citizens' St. Ry. Co.*, 22 U. S. App. 570, 12 C. C. A. 365, and 64 Fed. 628; *Louisville Trust & Banking Co. v. City of Cincinnati* (decided at present term) 76 Fed. 296."

Detroit Citizens' St. Ry. Co. v. City of Detroit, 64 Fed. 628

In *Citizens' St. Ry. Co. v. City Ry. Co.*, 56 Fed. 746, the court says:

"Assuming the truth of the facts alleged in the bill, as we must, for the purpose of this motion, there can be no doubt that the rights, privileges and franchises granted to the defendant impair the rights, privileges and franchises previously granted to the complainant, nor is there any doubt that the grant of rights, privileges and immunities to the complainant, coupled with its acceptance, and the expenditure of large sums of money on the faith thereof, constitute a contract protected by section 10 of Article 1 of the constitution. So it was held in the case of *Western Paving Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. Rep. 188, and 28 N. E. Rep. 88, in which the ordinances in question were considered by the supreme court of the state, and were adjudged to constitute a contract between the city and the complainant. Since the decision in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, it is no longer open to debate that where rights, privileges, and immunities are lawfully granted to and accepted by a private or quasi public corporation, and money or its equivalent is expended on the faith of such grant, a binding contract is thereby created, whose violation by a law of the state is forbidden by section 10 of Article 1 of the constitution of the United States."

Mercantile Tr. & Dep. Co. v. Collins Park Co., 99 Fed. 812, 816.

In *City of Kansas v. Corrigan*, 86 Mo. 67, 70, the court says:

"The results flowing from this ordinance and its acceptance was the creation of a contract by and between the city and the accepting company, which contract the city could not,

by any subsequent ordinance, affect or impair. The city, under the terms of the contract-creating ordinance, might compel the company to keep and maintain the specified portions of the street 'in good repair' but beyond this the city authorities could not go, nor the company be compelled to do or perform."

Springfield Ry. Co. v. City of Springfield, 85 Mo. 674, 676

East Louisiana Ry. Co. v. City of New Orleans, 46 La. Ann. 526

In *City of Burlington v. Burlington St. Ry. Co.* 49 Iowa, 144, 147, the court says:

"The ordinance as adopted gave the defendant authority to lay the double track in controversy in this case. Under this ordinance the defendant expended large sums in the construction of its railway. The ordinance constitutes a contract whereby defendant is secured in the exercise of the powers conferred therein. If it had not this effect defendant would have no security that its property would not be destroyed by unfriendly legislation by the city council. The law will secure to defendant the exercise of all the powers conferred by the ordinance. The city cannot, without the consent of the defendant, change the terms of the contract entered into by the ordinance, nor abrogate or nullify it. The amendment, therefore, which attempts to take from defendant the right to lay a double track cannot have the effect intended, and will deprive defendant of no right guaranteed by the original ordinance.

Nor, as we have seen, is this statement of the rule inconsistent with the opinion of this court as expressed in *Baltimore v. Baltimore Trust & Guarantee Co.*, 166 U. S. 673. See also

City of Des Moines v. Chicago, R. I. & Pac. Ry., 41 Iowa, 569, 573

City of Indianapolis v. Con. Gas. Trust Co., 140 Ind. 107

Western Paving etc. Co. v. Citizens' St. R. Co., 128 Ind. 525, 529

Village of London Mills v. White, 208 Ill. 289, 298

In Wright v. Milwaukee Elect. Ry. & L. Co., 95 Wis. 29, 35, the court says:

"The ordinance, when accepted and acted upon by the grantee, becomes also a contract between the public, acting through the city council, on the one hand, and the railway company, on the other; the consideration for the partial surrender of the street being the advantages to the public arising from inexpensive and rapid transit, and the assumption by the company of the duty of continuing to furnish such transit during the life of the ordinance. But the right under consideration is something more than an easement, and more than a mere contract right. It is also a franchise granted by the state, acting through the common council of the city, to the railroad company. It becomes, when owned by a corporation, one of its corporate franchises, for failure to exercise which an action may be brought by the attorney general, in the name of the state, to vacate its charter, under sec. 3241, R. S. 1878. This was held in the case of State ex rel Att'y Gen. v. Madison St. R. Co., 72 Wis. 612, and has been affirmed in principle in numerous later decisions. Ashland v. Wheeler, 88 Wis. 607; State ex rel Milwaukee St. R. Co. v. Anderson, 90 Wis. 550; State ex rel Att'y Gen v. Janesville W. Co. 92 Wis. 496.

"By the acceptance of the terms of the ordinance, the railroad company assumed a public

trust. It undertook to serve the public, by affording it rapid transit; and it became its duty to continue that service, not simply because it had contracted so to do, but because it had become charged with such duty by legislative grant. It could not lay down the burden when it chose, nor emancipate itself by merely ceasing to operate its cars."

In *Western Union Tel. Co. v. Visalia*, 149 Cal. 744, 750, the court says:

"While the appellant had the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city, nevertheless it could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the city had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel. And we think that the ordinance in question was not intended to be anything more, and is nothing more, than the exercise of this authority to regulate. But such regulation is not the granting of a franchise; it is a restriction of and burden upon a franchise already existing; it is not an original and affirmative granting of anything in the nature of a franchise. Indeed, the ordinance and its acceptance by plaintiff—which acceptance was necessary to give it any effect—was in the nature of a contract between the parties."

And so in the case at bar, under the provisions of Ordinance No. 599 evidencing the legislative grant, it was within the competency of the Common Council, in the exercise of its police power, and in the exercise of the express provisions of Section 3 of

the Ordinance, to make or to alter regulations at any time for the conduct of the road within the limits of the city, and to regulate the speed of railway cars and locomotives within such limits, and whether the ordinance is construed to be a contract, or whether the right to regulate arises under the police power, this ordinance expressly provided that the Common Council might restrict or prohibit the running of locomotives, not absolutely and altogether, but at such times and in such manner as the Council might deem necessary.

Nor can it be said that by the Act of January 23, 1903, (the present charter of the City of Portland) the legislative intent was to amend; modify or repeal the state statute contained in Sections 6841 and 6842 Lord's Oregon Laws, or to confer upon the Common Council, under the charter of the City of Portland, authority to amend, modify or repeal Ordinance No. 599, or to impair any rights granted to the railroad company under the provisions of the state statute.

Under the provisions of the Act of January 23, 1903, (Pages 12, 431, 432, 433 Transcript) the Council is given power and authority by ordinance to agree with any corporation, firm, or person constructing a commercial railroad, and desiring to enter the city, upon the extent, terms and conditions upon which the streets, alleys or public grounds of the city may be appropriated, used, or occupied by such railroad, and upon the manner,

terms and conditions under which the cars and locomotives of such railroad may be run over and upon such streets, alleys and public grounds, such corporation to be subject to the provisions and regulations of Sections 95, 97, 100 and 101 of that charter. (See page 12 Transcript) These provisions and this charter were clearly applicable to future obligations, and were not retroactive, even if they could be construed to be retroactive and as intending to repeal the provisions of the state statute, supra, and the rights evidenced by Ordinance No. 599. The provisions of Section 106 of this charter expressly negative any such conclusion. Section 106 reads as follows:

"All franchises or privileges heretofore granted by the city, which are not in actual use or enjoyment, or which the grantees thereof have not in good faith commenced to exercise, are hereby declared forfeited and of no validity, unless said grantees or their assigns shall, within six months after this charter takes effect, in good faith, commence the exercise or enjoyment of such grant or franchise. Nothing in this charter contained shall affect the validity of any franchise, right, or privilege in actual use or enjoyment heretofore given or granted by any former or the present City of Portland, or by the City of East Portland, or by the City of Albina, and the same shall be and continue in force and effect as given or granted by said cities or either of them."

Furthermore, it is a fundamental rule that repeals by implication are not favored.

"It is a sound and reasonable principle of

very extensive operation that affirmative statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities, but they do so when this clearly appears to have been the purpose of the legislature. If both the general and the special acts can stand, they will be construed accordingly. If one must give way, it will depend upon the supposed intention of the law-maker, to be collected from the entire legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactments. So particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the state, and of the object of the legislature in the erection of municipalities, as before explained."

1 Dillon on Municipal Corp. 5th Ed. Sec. 235

To the same effect is the current of judicial opinion.

City of Louisville v. Louisville Water Co., 105 Ky. 754

3 Elliott on Railroads, 2nd Ed. Sec. 1076

Detroit Citizens St. Ry. Co. v. City of Detroit, 64 Fed. 628

Wright v. Nagel, 101 U. S. 791

Eichels et al. v. Evansville St. Ry., 78 Ind. 261, 263

Chicago, R. I. & P. Ry. Co. v. City of Joliet, 79 Fed. 25

Hudson Tel. Co. v. City of New Jersey, 49 N. J. L. 303

State v. Noyes, 47 Me. 189

Rio Grande Ry. Co. v. City of Brownsville, 45 Tex. 88

McQuaid v. Portland & Van. Ry. Co., 18 Or.
237

Pacquet v. Mt. Tabor St. Ry. Co., 18 Or.
233.

In the two cases last cited the Supreme Court of Oregon had occasion to construe in a general way the effect of the state statute, Sections 6841 and 6842 Lord's Oregon Laws, *supra*.

It is unnecessary to review at further length the authorities cited under Point I. They are, however, conclusive to the point that the rights of the railroad company in this case depend in the first instance upon a legislative grant as authorized by Sections 6841 and 6842 Lord's Oregon Laws, *supra*, and that these rights, when evidenced by municipal action designating the street, or expressing the terms and conditions upon which the street may be appropriated, constitute a contract which cannot be subsequently impaired, modified or repealed by legislative action; that the power of the municipality is restricted to the power reserved in the ordinance, or, at most, to the right in the exercise of the police power, to prescribe reasonable rules and regulations by which the railroad company may enjoy the rights granted; and that it is not within the power of the state or of the municipality, under the guise of an exercise of the police power, to destroy that use, and that the state or municipality, in the exercise of the rights reserved by the terms of the ordinance, or in the exercise of the police power, may reasonably regulate the use of the rights granted.

II.

Whether the rights created under the provisions of Sections 6841 and 6842 Lord's Oregon Laws, evidenced by the enactment of Ordinance No. 599, are deemed to be granted directly by the state, under the state statute, or are created by the enactment of Ordinance No. 599, and the acceptance of that ordinance by the railroad company, is only material for the purpose of determining the extent of the power and authority of the City of Portland under its charter of January 23, 1903. In either case, as matter of law, the Common Council has no power to repeal, amend, or modify this ordinance. The rights thereby created or evidenced constitute a franchise or contract which cannot be altered, impaired or repealed, and these rights when accepted by the grantee, became a vested property right which could be assigned, conveyed, mortgaged, sold, leased, or otherwise disposed of in the same manner and for the same purposes as any other property of this kind.

In *City of Rushville v. Rushville Nat. Gas. Co.*, 164 Ind. 162, 165, the court says:

"The acceptance by appellee of the privileges granted by appellant in this ordinance constituted a contract equally binding upon both parties, and when acted upon rights became vested, and its provisions became secure against impairment by any subsequent municipal action."

See also note to this case annotated in 3 Am. & Eng. Ann. Cases, 86, 88.

Even in the state of Illinois, where a grant of this kind by a municipality is deemed a license and not a franchise, the rule is settled that when the license has been accepted, it becomes a binding contract between the city and company, which cannot be revoked or rescinded, except for cause.

People v. Central Union Tel. Co., 192 Ill. 307, 311

Chicago Tel. Co. v. Northwestern Tel. Co., 199 Ill. 324, 347

3 Dillon on Municipal Corp. 5th Ed. Secs. 1210, 1222, 1242

"A legislative grant of the right to use the city streets for a public service upon condition of the performance of the service by the grantee, when accepted and acted upon by the grantee, is a contract between the grantee and the state, which is protected by the constitution of the United States, and which cannot be impaired by subsequent state legislation. When the grant of the right to so use the streets flows from the act of the municipality, similar principles apply. The municipality acts by virtue of delegated authority from the legislature, and as the representative or agent of the state for that purpose. Hence, an ordinance of a city, made pursuant to legislative authority, granting the right to use the streets of the city for a railroad, or for gas or water mains and pipes, or for electric poles, wires, or conduits, or for any other recognized public service, is, when accepted and acted upon by the grantee, a contract within the protection of the Federal Constitution, and new conditions cannot, in the absence of a reserved power, be imposed on the exercise of the right granted, except, as we shall hereafter see, so far as these conditions may be authorized by the exercise of the police power."

3 Dillon on Municipal Corp. 5th Ed. Sec.
1242

In town of Mason v. Railroad Co., 51 W. Va.
183, 186, the court says:

"In our day the railroads are a prime necessity for transportation and inter-communication. They must pass by towns and cities where heavy population and business imperiously demand their presence. In most, or in many instances, they must pass through the streets. So must the public pass along the same streets. It follows of necessity that both the people and the railroad must use these streets in common. Each must give and take. It is very well settled that a railroad may be lawfully constructed upon, or across a street, with the consent of the town or city, upon the terms specified by statute, and the terms which the municipal authorities may see fit to incorporate in the grant. When such a grant is made by a municipality, it is a binding contract between it and the railroad company, which may not be abrogated by the municipality."

See also Vicksburg v. Vicksburg Water-
works Co. 202 U. S. 453

City of Louisville v. Cumberland Tel. Co.
224 U. S. 649

Mr. Justice Lamar, in the case last cited, speaking for the court says:

"But in 1886, when the Ohio Valley Telephone Company was chartered, the legislature not only had the sole right to create corporations and to grant franchises but, without municipal consent, it could have authorized the company to use any and all streets in the city of Louisville. Instead, however, of exercising this plenary power, the charter de-

clared that the company might maintain its telephone system, erect poles and string wires over the streets and highways of the city, with and by the consent of the General Council. These provisions of the charter gave the municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept—in which event the franchise granted by the state would have been nugatory. But, when the assent was given the condition precedent had been performed, the franchise was perfected and could not thereafter be abrogated by municipal action. For, while the city was given the authority to consent, *the statute did not confer upon it the power to withdraw that consent*, and no attempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the company's giving a bond and carrying the police and fire wires free of charge. If those or other terms of this independent and separate contract had been broken by the Ohio Valley Company or its successors, the city would have had its cause of action. But the municipality could not by an ordinance impair that contract nor revoke the rights conferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the State of Kentucky. Such franchises granted by the legislature could not, of course, be repealed, nullified or forfeited by any ordinance of a General Council."

In *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 386, 396, the court says:

"In *City Railway Company v. Citizens' St. R. Co.*, 166 U. S. 557, the common council of Indianapolis, on January 18, 1864, adopted an ordinance which said: 'Consent, permission and authority are hereby given, granted to and duly vested in the company organized with R. B. Catherwood as president, a body politic and corporate by the name of the Citizens' Street Railway of Indianapolis, and their successors, to lay a single or double track for passenger railway lines,' etc., under which ordinance the railway was built. This court said, page 567: 'The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the state was not at liberty to impair during its continuance; but if, at the expiration of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose.' * * *

"We have already seen that the legislature was competent to grant to the city of Detroit the right to give its consent to the laying of the tracks of a street railway and the operation of the same in and through its streets upon such terms and conditions as the parties might

agree upon. The grant of this power was not the formation of a municipal corporation, directly or indirectly, either in substance or effect. The legislative act which granted the power to the city could not be altered, amended or repealed by the latter. No such power was given to it by the legislature and probably could not even be delegated in any event. It is sufficient to say that none was attempted. *City Railway Company v. Citizens' Railway Company*, 166 U. S. 557, 563."

The rule is well expressed in *Hot Springs Electric Light Co. v. Hot Springs*, 70 Ark., 300, 303, where the court says:

"Now a grant which has been accepted and acted upon by the grantee is a contract, within the meaning of the constitution of the United States, which forbids laws impairing the obligation of contracts. When, therefore, rights and franchises lawfully granted to either a person or corporation have been duly accepted, and valuable improvements have been made on the faith of such grant, it becomes, in effect, a contract, which cannot be impaired either by a law of the state or by an ordinance of a municipality. The rights and franchises granted can then neither be revoked, nor can they be diminished in value by the imposition of additional burdens upon their use and enjoyment. *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98; *St. Louis v. Western Union Tel. Co.* 148 U. S. 92; *Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144; 2 Beach, Contracts, Sec. 1205; 3 Parsons on Contracts, (8th Ed.) 479; 15 Am. & Eng. Enc. Law (2d Ed.), 1049."

- Blair v. City of Chicago, 201 U. S. 400
 Cleveland v. Cleveland Electric R. Co., 201
 U. S. 529
 Los Angeles v. Los Angeles City Water Co.,
 177 U. S. 558
 Chicago v. Sheldon, 9 Wall. 50, 55
 Vicksburg Water Works Co. v. Vicksburg,
 185 U. S. 65
 City of Minneapolis v. Minneapolis St. R.
 Co., 215 U. S. 417
 Greenwood v. Freight Co., 105 U. S. 13, 21
 H. J. & C. Traction Co. v. H. & L. E. Trac.
 Co., 69 Ohio St. 402, 410
 Mayor etc. v. Houston St. Ry. Co., 83 Tex.
 548, 555

It is unnecessary to review the authorities at length as to whether or not the property rights granted to the Oregon Central Railroad Company are assignable without words of assignability expressed in the ordinance. In view of the fact that it is the policy of the state that commercial railroads having authority to construct their lines between termini, one of which may originate in another state, or beyond the corporate limits of a municipality, within the same state, and the other of which may be within the corporate limits of a large city, may, under the provisions of Section 6841 and 6842 Lord's Oregon Laws, *supra*, locate and construct and operate their lines of railroad on any street of any city to be designated by the municipal authorities, if such municipal authorities are willing to act, and to be appropriated notwithstanding the refusal of such municipal authorities to act; and in view of the fact that under the statute which

authorizes the incorporation of the Oregon Central Railroad Company, its charter was and could be perpetual; and in further view of the fact that the provisions of Sections 6679, 6680, 6683 Lord's Oregon Laws, were in effect when the Oregon Central Railroad Company was incorporated; and in view of the provisions of Sections 5068, 5070 Bellinger & Cotton's Code, which authorize the dissolution of a railroad company and the disposition and sale of its assets, it is settled that such franchise or private rights evidenced by Ordinance No. 599 were the subject of sale and transfer by the Oregon Central Railroad Company to the Oregon & California Railroad Company. This is recognized by the authorities cited by us under Point II.

In *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 660, Mr. Justice Lamar, speaking for the court, says:

"It is not necessary to determine whether that amendment was intended to supply an omission, remove a doubt or to ratify the transfer and use under this and prior mergers. *City Railway Co. v. Citizens' R. Co.*, 166 U. S. 557, 569. For while *franchises to be* are not transferable without express authority, there are *other franchises to have, to hold and to use*, which are contractual and proprietary in their nature and which confer rights and privileges, which can be sold wherever the company, as here, has power to dispose of its property. In the present case the Ohio Valley Company was by its charter given authority to mortgage and dispose of franchises. Among those thus held was the right to use the streets in the city for the purpose necessary in conducting a telephone

business. Such a street franchise has been called by various names,—an incorporeal hereditament, an interest in land, an easement, a right of way,—but, howsoever designated, it is property. *Detroit v. Detroit St. Ry.*, 184 U. S. 368, 394; *Louisville City Ry. v. Louisville*, 71 Ky. (8 Bush), 534; *West River Bridge v. Dix*, 6 How. 507, 534; *Board of Morristown v. East Tenn. Tel. Co.*, 115 Fed. Rep. 304, 307."

The assignability of this franchise or property right, evidenced by Ordinance No. 599, and the ownership of the Oregon & California Railroad Company, and its right to lease the same to the Southern Pacific Company as the operating company, and the continuance of all the rights evidenced by Ordinance No. 599, is recognized, ratified and confirmed by Section 106 of the charter of the City of Portland, approved January 23, 1903, which reads:

"All franchises or privileges heretofore granted by the city, which are not in actual use or enjoyment, or which the grantees thereof have not in good faith commenced to exercise, are hereby declared forfeited and of no validity, unless said grantees or *their assigns* shall, within six months after this charter takes effect, in good faith, commence the exercise or enjoyment of such grant or franchise. Nothing in this charter contained shall affect the validity of any franchise, right or privilege in *actual use or enjoyment* heretofore given or granted by any former or the present city of Portland, or by the City of East Portland, or by the City of Albina, and the same shall be and continue in force and effect as *given or granted by said cities or either of them.*" (Page 13 Transcript)

The principle that a property right created by a franchise or ordinance, is assignable, is well expressed in *New Orleans etc. Railroad Co. v. Delaware*, 114 U. S. 501, 507, where the court says:

"The ground upon which this view of the defendant is based is that the franchises of a railroad corporation are inalienable in Louisiana. In passing upon this question it is necessary to bear in mind the distinction between the different classes of railroad franchises. This was stated by Mr. Justice Curtis in the case of *Hall v. Sullivan Railroad Co.*, 21 Law Reporter, 138, S. C., 2 Redfield Am. Railway Cas. 621; 1 Brunner, 613, where he said: 'The franchise to be a corporation is therefore not a subject of sale and transfer unless the law by some positive provision made it so and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own and manage a railroad and to take tolls thereon are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable.'

"The same subject was considered by this court in the case of *Morgan v. Louisiana*, 93 U. S. 217, 223, where it was held that exemption from taxation was a right personal to the railroad corporation to which it was granted, and did not pass upon a sale of its property and franchises. Mr. Justice Field, who delivered the opinion of the court, distinguished such an immunity from taxation from those rights, privileges and immunities which, accurately speaking, are the franchises of a railroad company. He said: 'The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would

be of little value. * * * They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction.'

"We are of the opinion that those franchises which in the case just cited are described as necessary to the use and enjoyment of the property of a railroad company are assignable in Louisiana, and that there is no warrant in the jurisprudence of that state for holding the contrary.

"That the quality of being transferable attaches to such franchises of a railroad as are essential to its use and enjoyment by the company is conclusively shown by Section 2396 Rev. Stat. Louisiana, Act of 1856, page 205, which was in force when the first Canal Street, City Park and Lake Railroad Company was organized, and has been in force ever since. That section provides as follows: 'In addition to the powers conferred by law upon railroad companies, any railroad company established under the laws of this state may borrow, from time to time, such sum of money as may be required for the construction or repairs of any railroad, and for this purpose may issue bonds, or their obligations secured by mortgage, upon the franchises and all the property of said companies.'

"The authority to mortgage the franchises of a railroad company necessarily implies the power to bring the franchises so mortgaged to sale, and to transfer them with the corporeal property of the company to the purchaser. It could not be held that when a mortgage on a railroad and its franchises was authorized by

law, that the attempt of the mortgagor to enforce the mortgage would destroy the main value of the property by the destruction of its franchises.

"Since the passage of the act of 1856, the Supreme Court of Louisiana has recognized the validity of the transfer to individuals of those rights and franchises of a railroad company without which the road could not be successfully used.

"In the case of *Chaffe v. Ludeling*, 27 La. Ann. 607, it was declared that the defendants, by their purchase at sheriff's sale of the property of the Vicksburg, Shreveport and Texas Railroad Company, a Louisiana corporation, acquired 'the privileges and franchises of the corporation, its powers to operate the railroad. The sheriff's sale made them the owners of the road, its right of way, its property, its franchise, but did not and could not make them a corporation. * * * This sale conveyed to them the rights and property of that company; it made them joint owners thereof.'

"There is, therefore, nothing in the nature of a corporate franchise under the law of Louisiana which forbids its transfer with the other property of the corporation. And such must be the conclusion whenever a railroad company is authorized by law to mortgage its tangible property and franchises. When there has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchises, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passed to the purchasers. This was assumed to be the law by the opinion of this court pronounced by Mr. Justice Matthews in the case of *Memphis Railroad Co. v. Commissioners*, 112 U. S. 609, 619, where it was said: 'The franchise of being a corporation need not be implied as necessary to secure to the mortgage

bondholders or the purchasers at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it and the franchise of maintaining and operating it as such.' See also *Hall v. Sullivan Railroad Co.*, above cited; *Galveston Railroad v. Cowdrey*, 11 Wall. 459.

"It follows that if the franchises of a railroad corporation essential to the use of its road, and other tangible property, can by law be mortgaged to secure its debts, the surrender of its property, upon the bankruptcy of the company, carries the franchises, and they may be sold and passed to the purchaser at the bankruptcy sale."

III.

It was not within the police power of the City of Portland to enact a valid ordinance containing the terms and provisions of Ordinance No. 16491. Such ordinance was not a reasonable exercise of the police power of the city, or of the state. The Council cannot, under the police power, by mere legislative fiat, declare an act to be a nuisance, or assume it to be a nuisance, and abate a lawful act, without judicial review, or opportunity for judicial review, on questions of fact. The use and operation of steam locomotives is not per se a nuisance, nor an injury to the public; nor can it be shown to be an injury in any sense, to the public.

Neither is Ordinance No. 16491, as held by the court below, a regulation within the police power of the state. It is not a regulation of the exercise of the rights evidenced by Ordinance No. 599. On the

contrary, it is a prohibition of the use of steam locomotives at any time, whether day or night, and it is a denial of the right to exercise and enjoy the necessary valuable privilege and duty of operating freight trains at any time on this street.

It will be noticed that Ordinance No. 16491, (Pages 8 and 9 Transcript) makes it unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, (recognizing the assignability of the right and franchise to operate trains on Fourth Street, and recognizing the right of complainant to operate trains, as lessee) to run or operate steam locomotives or freight cars over the same after eighteen months from May 1, 1907, excepting freight cars for reconstruction, repair or maintenance of the railway lawfully and rightfully on said street. It will thus be seen that by Section 1, the Council recognizes that the railway is lawfully and rightfully on the street; that the Oregon Central Railroad Company could assign such right, and that the same could be leased, and that it was lawful to operate steam locomotives and freight cars for a period of eighteen months after May 1, 1907. By Section 2, it is provided that any violation of the provisions of the ordinance by the owners, officers, agents, or employees of the Oregon Central Railroad Company, or its successors, assigns, or lessees, etc., by so running or operating steam locomotives or freight cars, or attempting to run or operate same on said Fourth Street, after the

time mentioned, should be punishable as stated, and that such violation should be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street. It is true that under Section 3 of this ordinance the Council attempts to say that Ordinance No. 16491 should not be construed to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway, etc., but it is manifest that such attempted provision is, in the face of the affirmative provisions of Sections 1 and 2, void.

"The basis of the exercise of the police power is the protection of human life and the promotion of public convenience and welfare. Municipal regulations not having a fair relation to these objects are unreasonable, but when they fairly tend to promote these objects they are generally sustained."

3 Dillon on Municipal Corp. 5th Ed. Sec. 1270

"It is a general rule that the right to exercise the police power cannot be alienated, surrendered, or abridged, either by the legislature or by the municipality acting under legislative authority, by any grant, contract, or delegation, because it constitutes the exercise of a governmental function without which the state would become powerless to protect the public welfare. Hence, when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the implied condition that it shall be held subject to the reasonable and necessary exercise of the police powers of the state, operating either through legislative enactment or municipal action. But these franchises are property which cannot be

destroyed or taken from the grantee or rendered useless by the arbitrary act of the municipal authorities in preventing the grantee from using the city streets for the purposes of the grant, although the municipality may seek to justify such act as an exercise of the police power. *Therefore, any regulations adopted by virtue of the exercise of the police power must be such as are called for by a fair consideration of the public welfare, must be reasonable in their character, and must not be such as to defeat the purpose of the grant. The franchise or privilege being founded upon a grant from the state, the municipal authorities cannot by virtue of the police power impose any conditions upon the exercise of the right granted which are inconsistent with the franchise or privilege granted.*"

3 Dillon on Municipal Corp. 5th Ed. Sec. 1269

In *City of Belleville v. Turnpike Co.*, 234 Ill. 428, 437, the court says:

"Police power has been defined by this court as that inherent plenary power in the state which permits it to prohibit all things hurtful to the comfort, welfare and safety of society. It is 'co-extensive with self protection, and is not inaptly termed 'the law of overruling necessity.'" (*Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191.) While the police power of the state can be used to promote the health, comfort, safety and welfare of the city and is very broad and far reaching, it is not without its restrictions. (*Ritchie v. People*, 155 Ill. 98) It must not conflict with the constitution, and must have some relation to and be adapted to the ends sought to be accomplished. Rights of property will not be permitted to be invaded under the guise of police regulation. (*Bailey v. People*, 190 Ill.

28) The legislature may determine when the exigency exists for the exercise of the police power, but it is for the courts to determine what are the subjects of police powers and what are reasonable regulations thereunder. (People v. Steele, 231 Ill. 340; Booth v. People, 186 id. 43) Has appellee taken possession of this turnpike to enable it to promote the health, comfort, safety or welfare of society? * * *

"Nothing is disclosed on this record either as to the increase of population, topography of the ground, or any other reason in connection with the health, safety or comfort of the community, that will furnish any reasonable argument for taking the appellant's property, without paying therefor, through the present annexation of territory. This court, in *City of Chicago v. O'Brien*, 111 Ill. 532, speaking through Mr. Justice Scholfield, said (p. 536): 'Even the police power, comprehensive as it is, has some limitations. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be, for the time, to the public health, safety, etc.'"

In *Chicago, Burlington & Quincy R. Co. v. People*, 200 U. S. 561, this court held that even to promote the public health, public morals, or public safety, property could not be taken without compensation, for public use, under the police regulation, any more than it could when it bore no relation to such matters, but only to the general welfare; that the foundations of the police power were the same in every case.

So in the case at bar, under a state statute granting to the railroad company an absolute right

to use this street, whether the municipality gave its consent or not, the terms of the ordinance expressly provide that consent, as here, under Ordinance No. 599, became a contract and limited the power of the state to the exercise of its police power directly, or through the instrumentality of the municipality, to the adoption of reasonable regulations which should be calculated *to protect and preserve the use of that street by the railroad company*. Such use could be regulated in a *reasonable way*, and while under some peculiar and particular circumstances, as in the case of Railroad Co. v. Richmond, 96 U. S. 521, the use of steam locomotives may be forbidden, in the exercise of the police power, and in the absence of vested rights granted under a settled policy of the state, yet where such prohibition is exercised under an ordinance expressive of the said right, which on its face limits the right to prohibit the operation of steam locomotives entirely, and defines the measure of that right as one of regulation, instead of prohibition, it is clear that in the absence of state action, and in the absence of judicial determination, that the operation of steam locomotives is a nuisance upon a city street, that it is not competent, under the police power, to do more than regulate the time or manner of the further operation of steam locomotives. If the Common Council had declared that such steam locomotives could only be moved at such a rate of speed, or that steam locomotives using a particular kind

of fuel only, could be used, or that such steam locomotives could only be operated on this street between certain hours of the night, such exercise of the police power could have been sustained, both under the terms of Ordinance No. 599, and under the general authority. Such exercise would be a regulation, and would not deprive the railroad company of the enjoyment of its property, or of the use contemplated by its public functions. When this prohibition, absolute in terms, is coupled with a proviso that freight trains or freight cars shall not be moved over, upon or along the street at all, excepting freight cars for reconstruction, repair or maintenance of the railroad, it operates to deprive the railroad company of its chief function and usefulness, and destroys its right to carry freight of any kind, whether mail, baggage, express, or ordinary freight. It is a denial of the right of the railroad company to exercise a privilege and perform a duty which on the one hand, it enjoys, and on the other hand, owes to the state. It would have been a reasonable regulation under the police power, perhaps, if the city, by a proper ordinance, had limited the time when freight trains or freight cars could be moved over Fourth Street. Whether the ordinance would, or would not be reasonable in this respect, would depend upon whether it was destructive of the public functions of the railroad company, and so far destroyed its right and obligation in that respect, as to impair its contract rights and destroy the per-

formance of its public functions under its charter, and under the laws of the state.

Ordinance No. 16491 not only attempts to make unlawful the operation of steam locomotives *at any time*, but makes it unlawful to *move freight cars* on this street, and for a violation of the mandatory provision of the ordinance, in addition to imposing severe penalties upon the officers, agents, or employes of the company, attempts to forfeit any and all rights and privileges of the railroad company on account of and when any such violation occurs. This is a legislative declaration attempting to deprive the railroad company of its property rights without trial. It is clearly not within the power of the Council to declare the operation of this railroad a nuisance, without judicial investigation or inquiry.

Ex parte Wygant, 39 Or. 429, 432
Grossman v. City of Oakland, 30 Or. 478;
36 L. R. A. 593, note

The court cannot say, as matter of law, that the operation of a steam locomotive, or the operation of a freight car, on a city street, is in and of itself injurious to the public health, the public morals, or the public safety. Whether it is so, is a judicial and not a legislative question.

IV.

The City of Portland has ratified the assignment of this franchise and the rights of complainant therein, and is estopped from claiming that such

franchise was not assignable and that complainant has no rights thereunder. Furthermore, by Section 106 of the act of January 23, 1903, now in effect, *supra*, the City of Portland ratified and confirmed Ordinance No. 599 and recognized and ratified its continuance in force and effect as originally granted.

In *Port of Mobile v. Louisville & Nashville R. R. Co.* 84 Ala. 115-119, the Court says:

"Upon the faith of this grant the track of the road was constructed through Commerce Street, with the necessary sidings and turn-outs, for the purpose of loading and unloading freight and merchandise into and from the various stores and warehouses located upon said street; and has been ever since continuously used for this purpose from day to day, without complaint or objection from any source, for a period of seventeen or eighteen years, until the attempted revocation of the ordinance in December, 1886.

"The privilege thus granted is obviously a franchise of the most valuable kind—being one of the most common examples of such a grant or privilege.—*Davis v. Mayor*, 67 Amer. Dec. 186, 193. It is certainly a 'right, privilege or franchise' within the meaning of the company's charter, having reference, as it does, to the construction and management of the railroad, and the conduct of its business of transportation within the limits of the City of Mobile. Such a special privilege conferred directly by legislative enactment, or in a mode provided for by such enactment, becomes a contract between the State and the corporators, and, as such, has always been protected from impairment by legislative ac-

tion by virtue of both the Federal and State constitutions, each of which prohibits the passage of any law by which the obligation of existing contracts is impaired or lessened.

"The privilege in question is none the less a franchise, in the proper sense of that term, because it was granted, not directly by legislative enactment, but by the municipal authorities of Mobile under the sanction of the charter, which is itself a legislative enactment. The grant by the city without such sanction would be unauthorized by law and void.

"The right to lay a track through a street implies by necessary implication the right to use such a track in the mode ordinarily adopted by railroad companies, and subject to reasonable regulation under the police power of the proper authorities. The right to lay side tracks and turn-outs, in like manner, implies the right to use them, and the only use which could be reasonably contemplated by their construction is for the transportation of goods to and from the adjoining stores and warehouses. Add to this the significant fact that the railroad company, after being placed in possession of its franchise, construed it to confer this right, and exercised it uniformly without complaint or interruption for between seventeen and eighteen years. A contemporaneous construction of a law is of very high authority. The practical exercise of a right under it, acquiesced in by the public, and not denied by those adversely interested, is the strongest evidence that it has been rightly interpreted. The practical construction thus established by years of uniform usage is often allowed by the courts, even in doubtful cases, to have the force of settled law. A like rule prevails in the construction of contracts, the

court being always strongly inclined to interpret every agreement as the parties themselves have done by practical usage, regarding their conduct in the everyday execution of its terms as an agreed interpretation of them.

"Our conclusion is that the railroad company was possessed of an irrevocable franchise, conferred by the city ordinance, giving it the right to load and unload freight at its sidings and turn-outs, constructed on Commerce street, subject to the limitation only that the use of the street by the public should not be unnecessarily or materially impaired."

In *C. R. I. & P. R. R. Co. v. City of Joliet*, 79 Ill. 25, the Court says:

"From all these positive acts of recognition on the part of the city of Joliet of the right claimed by the railroad company, and long acquiescence in its exercise, there must be held to be an estoppel *in pais* against the city, if that principle be applicable at all to municipal corporations, as respects public rights.

"In *Goodwin v. The City of Milwaukee*, 24 Wis., it was distinctly held that the doctrine of estoppel *in pais* was applicable to a municipal corporation in respect of a matter of public right.

"We think there is sufficient warrant of authority for the application of the principle of an equitable estoppel to a case of the character disclosed by this record, and that it should be applied here.

"As to the ordinance of the common council of the city of Joliet, of September, 1872, declaring the railroad a nuisance, we regard that as without effect upon the case, although the charter of the city confers upon the com-

mon council the power to abate and remove nuisances, and to punish the authors thereof, and to define and declare what shall be deemed nuisances. We will, in this respect, but refer to the language of the Supreme Court of the United States in *Yates v. Milwaukee*, 10 Wall. 505: 'It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws, either of the city or the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities.' And see *State v. Jersey City*, 5 Dutch. 170.

"Some stress is laid upon a certain proviso in the ordinance of the common council, of January 3, 1853, before referred to, which is as follows: 'Provided, that said railroad company shall be subject to all laws and ordinances that may hereafter be passed to regulate railroads in the city.' That only means, that the company should be subject to all reasonable and legal ordinances for the regulation of the road. It had no such scope, that the railroad company should abandon or take up and remove its track at the bidding of the common council."

The case last cited is particularly in point as to that portion of Ordinance 1649, *supra*, which attempts to forfeit the rights of the company for an alleged violation of the provisions of the ordinance. Property rights cannot thus be disposed of by mere legislative fiat.

In *Commercial Electric Light & Power Co. v. Tacoma*, 17 Wash. 661-670, the Court says:

"But even if it could be said that plaintiff's franchise was subject to forfeiture under the letter of the ordinance, still it appears that the city waived its right to forfeit by recognizing the ordinance as being in force long after the time it now claims the forfeiture occurred. It maintained its own wires upon the respondent's poles; it assessed and collected taxes on the franchise granted by the ordinance; it failed and neglected to set up the claim of forfeiture in suits which were brought against the city to enforce the same rights now claimed by the respondent, and it is too late now to assert its right and thereby destroy plaintiff's property and business. *Ludlow v. New York, etc., R. R. Co.*, 12 Barb. 440; *Santa Rosa City R. R. Co. v. Central St. Ry. Co.*, (Cal.) 38 Pac. 986; *Spokane St. Ry. Co. v. Spokane Falls*, 6 Wash. 521 (33 Pac. 1072). . . .

"The next contention of appellants is that, regardless of ordinance 318, the Tacoma Electric Company had no authority and, consequently, no power, to assign its corporate privileges and franchises to the respondent, for the reason that, without legislative authority, the grantee of a public or quasi-public franchise cannot assign or sell the same, or in other words, that a public or quasi-public corporation cannot disable itself by contract from the performance of public duties which it has undertaken, without legislative consent. This principle has been frequently declared by the courts and it was especially announced in the following cases cited by the appellants: *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1 (9 Sup. Ct. 409); *Briscoe v. Southern Kan. Ry. Co.*, 40 Fed. 273; *Gibbs*

v. Consolidated Gas. Co., 130 U. S. 396 (9 Sup. Ct. 553). . . .

"The question therefore is, Does the principle announced by the above cases apply to the case at bar? In the first case above cited, a railway company, organized under the laws of Oregon, leased a railroad, its appurtenances and franchises, from a railroad corporation organized under the laws of Scotland, for the period of ninety-six years. The Oregon company took possession of the road leased by it, and for three years operated the same and paid the rent reserved in the lease. It then offered to return the property to its lessor and refused to pay after-accruing rent. The plaintiff brought its action to collect the rent due and payable under the lease, and the court held that the Oregon company was not authorized to lease the railroad, nor the foreign company to make the lease, and that the contract, being contrary to law and public policy, could not be enforced.

"In the *Gibbs case* above cited, the plaintiff sued the defendant corporation for compensation for obtaining a certain contract between it and other gas companies, to regulate the price of gas, etc., and it appeared that such a contract on the part of defendant was absolutely prohibited by law, and the court there held, as in the other case, that the plaintiff was not entitled to recover in the action.

"And in *Briscoe v. Southern Kan. Ry. Co.*, *supra*, the court held that the lease of the railroad which was not authorized by law, was not sufficient to relieve the lessor from liability for damages caused by the negligence of the servants of the lessee who was operating the road.

"But we think there is a plain distinction between these cases and the one at bar. The Tacoma Electric Company did not assign or

transfer any franchise or privilege granted to it by the state. It simply assigned to respondent a privilege which the city in plain terms had granted to it and its assigns, and that right in our judgment was included in that class of property which the statute provides may be bought, held, mortgaged, sold and conveyed by a corporation organized in accordance with the laws of this state. . . .

"It is further urged on behalf of the appellants that the contract to maintain wires upon the poles of the Tacoma Light and Water Company amounted to a mere license revocable at will, and that such license was revoked *ipso facto* by the selling of the light plant to the city. But conceding that to be true, it nevertheless plainly appears that the city continued to enjoy the benefits accruing from that contract up to the very time this action was instituted, for, until that time, it left its own wires upon the poles of the respondent just as they were when the sale was accomplished, and on June 30, 1895, it demanded and received from respondent 'rental' for the use of its poles at the contract price. It cannot be permitted to accept and enjoy the fruits of the contract and at the same time deny its existence or claim that it was revoked."

In *Carter v. Meuli*, 122 Cal. 367-369, the court says:

"It is contended that the franchise could not be assigned without the consent of the granting power, as it is a personal trust. (*Wood v. Truckee*, 24 Cal. 474; *People v. Duncan*, 41 Cal. 511; *Visalia v. Sims*, 104 Cal. 328.)

"We find, however, that after the assignment the board of supervisors recognized assignment and required Mrs. Carter to give

a bond as owner of the franchise. The board also approved and filed the bond.

"This was a ratification and approval of the transfer."

In *The State v. Water Co.*, 61 Kan 547-558, the court says:

"It is earnestly claimed by counsel for plaintiff that The Topeka Water Company had no power to mortgage or convey its franchises granted by the state or the city of Topeka. As to the franchises received from the state we agree, but as to those privileges and rights conferred by the city, the law is well settled against the contention of counsel for plaintiff. There is a marked distinction between a franchise which is essential to the creation and continued existence of a corporation—a right to exist as an artificial being—a right conferred by the sovereignty of the state—and those rights subsidiary in their nature by which the corporation obtains privileges of more or less value, to the enjoyment of which corporate existence is not a prerequisite. A corporation exists by the will of a sovereign power. To this superior authority it owes an allegiance which it cannot abjure. It cannot, by a bargain, sale, or mortgage, alienate or encumber its birthright, nor in any manner part with those accompanying powers granted by its creator which are essential to its existence and vitality. A corporation may exist without property. Therefore, when it sells or mortgages property owned by it, it does not impair its right to live—a privilege conferred by the state and called a franchise. The statutes above quoted expressly authorize a corporation to mortgage its property.

"Counsel for the city treat *the franchise to be a corporation* and the franchise granted to

the water company by the city, giving it a right to occupy the streets, erect hydrants, supply water, etc., as the same. The rights granted to the corporation by the municipality above mentioned have been defined by law-writers as secondary franchises, and the question involved here is treated by Thompson in his Commentaries on the Law of Corporations, section 6140, as follows:

'The courts are united upon the proposition that a corporation has no power, independently of the express grant of the legislature, to mortgage or otherwise alien its franchise of being a corporation. It follows that those who purchase, at a judicial or other sale, the property and franchises of a corporation, do not thereby become a corporation. The purchase may vest in them all that is bought, as property, but they cannot prosecute the enterprise, as being a corporation, until they have been duly incorporated. Nor are they entitled to the restriction upon individual liability of members or stockholders accorded to the stockholders of the old corporation. If they issue bonds before becoming incorporated, they are liable thereon as ordinary obligors are; and the fact that they use the name of the old corporation in issuing such bonds makes no difference. But, as already seen, the secondary franchises of a corporation are assignable, except such franchises as are necessary to the performance of public obligations, and those are assignable only with the express consent of the legislature. The franchise of receiving tolls is a secondary franchise, which is in its nature assignable, at least with the consent of the legislature; and it has been held that authority in the governing statute of a plank-road company 'to mortgage the road or other property,' carries with it the

right to mortgage the franchise of receiving tolls, though not to mortgage any franchise essentially corporate in its nature, and such as cannot be enjoyed by a natural person.'

"Again, in section 6747, the author says:

"The secondary franchises of a corporation—that is to say, the peculiar privileges or rights which it may have received from the legislature under its charter or incorporating act, or from a municipal corporation under an ordinance by way of a license—are in the nature of property, and do not revert to the state upon the death of the corporation, but, being vendible, pass to a receiver or other representative of the corporation, among its other assets, to be administered for the benefit of its creditors; and the corporation may make a valid sale thereof, in like manner with its other property, before it is dissolved.'

"The rule is that the primary franchise of being a corporation vests in the individuals who compose it and not in the corporation itself, while the secondary franchises, such as the right of a railway to construct and operate its road, or the right to operate a water plant and collect water-rents, are vested in the corporation. The principle stated has been generally approved by the courts in this country. (*Union Pacific R. R. Co. v. Lincoln County*, 1 Dill. 325, Fed. Cas. No. 14,378; *Memphis R. R. Co. v. Commissioners*, 112 U. S. 619, 5 Sup. Ct. 299. 28 L. Ed. 837; *Morgan vs. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *The State, ex rel., v. Irrigating Co.*, 40 Kan. 96, 19 Pac. 349; *Joy v. The Jackson and Michigan Plank Road Co.*, 11 Mich. 164; *Detroit v. Mutual Gas Light Co.*, 43 Mich. 594, 5 N. W. 1039; *Fietsam v. Hay et al.*, 122 Ill. 293, 13 N. E. 501).

"The mortgage to the Atlantic Trust Com-

pany pledged all the property of the water company, including all rights, franchises, tolls, income, right-of-way grants, etc., then owned or to be thereafter acquired by the corporation. No express reference was made in the mortgage to the contract between the city and the water company, but we think the rights obtained under the city ordinances passed to the mortgagee. The ordinances accepted by the water company were in the nature of contracts and were property within the meaning of the law. (Railway Co. v. Campbell, ante, p. 439, 59 Pac. 1051; The West River Bridge Company v. Dix et al., 6 How. 534, 12 L. Ed. 535; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 7 Sup. Ct. 718, 41 L. Ed. 1165; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Thomp. Corp. Sec. 6747.) Under our statute, the words 'personal property' include money, goods, chattels, evidences of debt, and things in action; and the word 'property' includes both personal and real property. (Gen. Stat. 1897, ch. 1, Sec. 8; Gen. Stat. 1899, Sec. 7009.)

See also *Vicksburg v. Vicksburg Water Works Company*, 202 U. S. 453-464.

The case of *Louisville v. Cumberland Telephone Company*, 224 U. S. 649, is directly in point that the franchise evidenced by Ordinance 599 is assignable, as any other property rights.

The city of Portland has continuously since January 6, 1869, when Ordinance 599 was adopted, and up to October 6, 1880, when the Oregon Central Railroad Company disposed of its rights to the Oregon and California Railroad Company,

required the Oregon Central Railroad Company to comply with the terms and provisions of this ordinance. Since October 6, 1880 and since the ownership of the Oregon and California Railroad Company and the operation of the railroad by that Company, up to July 1, 1887, the city has recognized the right of the Oregon and California Railroad Company to operate its railroad on Fourth Street, and has required that company to repave the street as required by the ordinance, and otherwise to comply with its terms, and since July 1, 1887, continuously to date; and in Ordinance 16491, attempting to amend Ordinance 599 as stated, the city of Portland has recognized the assignability of this franchise and the right of the Oregon and California Railroad Company and Southern Pacific Company to maintain and operate its railroad thereunder, and both companies have continuously complied with the terms and provisions of Ordinance No. 599.

In addition to this and to the provisions of Section 106 of the act of January 23, 1903, now in effect, *supra*, the city of Portland has by the passage of Ordinance No. 3656, (pages 426-427 and 428 of transcript) recognized the right of the Oregon and California Railroad Company to the operation of its railroad on Fourth street, and in like manner has recognized the right of the Oregon and California Railroad Company by the passage of Ordinance No. 8099 (pages 428 and 429 of tran-

script). Like recognition is shown by the passage of Ordinance No. 13183, granting to the Oregon and California Railroad Company a sidetrack on Fourth street, to be used in connection with its railroad on Fourth street operated and maintained under Ordinance 599 (page 429 of transcript).

The proof shows payment of a large sum in renewals of track, construction of street and maintenance of same as required by Ordinance 599 and as directed from time to time by the city of Portland according to the terms and provisions of that ordinance, both before and after the transfer of the same to the Oregon and California Railroad Company on October 6, 1880, and before and since the transfer of the same by lease by the Oregon and California Railroad Company to Southern Pacific Company.

Under these circumstances it is clear that the city is estopped to claim that the franchise is not assignable or that the complainant is not entitled to assert the rights granted by Ordinance 599. Furthermore, the language of Section 106 of the charter of January 23, 1903, now in effect, *supra*, is a legislative ratification and recognition of Ordinance 599 as assigned to and owned by the Oregon and California Railroad Company and leased to the Southern Pacific Company.

V.

Under the Articles of Incorporation of the Oregon Central Railroad Company the duration of the corporation was perpetual, and in some jurisdictions it is held that where the duration of the franchise is not stated in the law or ordinance creating the same, the franchise continues during the corporate life of the grantee, and if that corporate life is in perpetuity, the franchise is perpetual. If, however, the duration of the corporation is limited, the franchise does not extend, under that rule, beyond the term of years for which the corporation was created.

St. Clair Co. Turnpike Co. v. Illinois, 96
U. S. 63, affirming 82 Ill. 174
Snell v. Chicago, 133 Ill. 413, 432

It has likewise been held by the Supreme Court of Illinois that where on the face of the ordinance granting the franchise, no time is stated, the right exists during the life of the municipality, and that where the municipality granting the right has been annexed to, merged in, or consolidated with a city or other municipality, the right is thereby terminated.

People v. Chicago Tel. Co., 220 Ill. 238

This rule, however, could not apply as to the life of the franchise evidenced by Ordinance No. 599, for two reasons,

First: Because the right was not granted by the municipality under the charter of the City of

Portland in effect October 14, 1864, (Pages 64-88 Transcript), but was granted directly by the state under the provisions of Sections 6841 and 6842 Lord's Oregon Laws, being Sections 24 and 25 of the Act of October 14, 1862.

Second: Because under Section 106 of the Act of January 23, 1903, being the present charter of the City of Portland, all franchises or privileges heretofore granted by the city, or by any former or the present City of Portland, or by the City of East Portland, or by the City of Albina, were continued in force and effect, "as given or granted by said cities, or either of them."

The Legislative Assembly of the State of Oregon, under the Act of February 19th, 1891, consolidated the then City of East Portland and the City of Albina, and incorporated the three municipalities under the name of the City of Portland. This Act took effect the first Monday in July, 1891, but by Section 213 thereof, all existing city ordinances of the City of Portland, the City of East Portland and the City of Albina as then incorporated and in force at that time, were continued in force and effect, and it was expressly provided that no right vested, nor liability incurred at that time, should be lost, discharged, or impaired. (Session Laws of Oregon, 1891, pages 796, 853)

Under Sections 6679, 6680, and 6683 of Lord's Oregon Laws, in effect under the Corporation Act of 1862, and in effect when the Oregon Central

Railroad Company was incorporated, and when Ordinance No. 599 was passed, authority was given for the formation of a private corporation in perpetuity, and providing that Articles of Incorporation of corporations formed for the purpose of constructing any railroad, should designate the termini of such road. Under Section 6686, such corporation had power to purchase, possess, and dispose of such real and personal property as might be necessary and convenient to carry into effect the objects of the incorporation, etc., and such corporation had power to dispose of its property by way of mortgage, to secure its bonds or other indebtedness.

There is no statute of the state, nor provision of the constitution, which forbids the granting of a franchise in perpetuity, and no such statute or constitutional provision has ever existed in the State of Oregon. Under such circumstances, therefore, the franchise evidenced by Ordinance No. 599, and granted under Sections 6841 and 6842 Lord's Oregon Laws, was one in perpetuity.

The policy of the state statute granting to a corporation a right to occupy any portion of a street within the corporate limits of a municipality, was in harmony with the necessity of the corporation, authorized by its Articles of Incorporation, to construct, operate and maintain a railroad in perpetuity. There is no reason why such railroad company should be given incorporation in per-

petuity, with the right of eminent domain to enable it to acquire rights of way, in perpetuity, and so long as used for railroad purposes; to acquire station grounds, terminals, and other rights needed for the operation of the road, in perpetuity, and at the same time derive from a state statute a right to operate that railroad in the street of a municipality, and assume that such right when so granted without words of limitation, and where no time is fixed, is at the pleasure of the state or municipality, and is a revocable license or permit which can be terminated whenever the state or municipality may elect so to do.

The statement of the contention of the city thus made in the case at bar carries with it its own refutation.

In Des Moines City Ry. Co. v. City of Des Moines, 151 Fed. 854, 861, the court says:

"For years the city of Des Moines, as well as the street car company, has construed the Turner ordinance as one granting a perpetual franchise, unless forfeited for just cause. Resolution after resolution has been passed by the Council, expressly or impliedly recognizing the Turner ordinance. The Council has compelled the company to pave on account of tracks built since 1898, the date the city now says its franchise expired. It now says that the Turner ordinance expired by limitation in 1898, and that since that time the ordinance has been obsolete. And yet in 1900 in codifying the ordinances in force, and omitting obsolete ones, the Turner ordinance was placed in such Code as a live ordinance, and one of

present binding force. The city council has directed new lines to be built since 1898, and since that date 30 miles have been built at great cost, and by so doing not only construed the ordinance as the company now contends, but the city ought to be and is estopped from denying the contract, tearing up the tracks, or declaring the company a trespasser. The complainant owns the tracks built by the Turner Company and its successors, and by conveyances of record owns the franchises as well, which were assignable. *Railroad v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244; *Detroit v. Street Railway*, 184 U. S. 368, 395, 22 Sup. Ct. 410, 46 L. Ed. 592; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.

"It is not to be overlooked that section 1064 of the Revision of 1860 under which the Turner ordinance was enacted, was much enlarged by section 464 of the Code of 1873. What was very doubtful under the Revision was made clear under the Code of 1873, because the city council was then given express authority to authorize both street and steam railways to occupy the streets; the latter, however, to pay damages to abutting property. But the authority of the city as to both was the same; and no one will claim that a steam road after paying damages is limited as to time in its occupancy. The duration as to time as to both is the same, unless limited by the terms of the ordinance. This is important in connection with the words, 'for the time,' in section 1, of the Turner ordinance.

"The fact that the life of complainant as a corporation is limited to a term of years is not decisive, because it has the right under our general corporation laws to renewal. And, if it had not, its assets, including the franchise asset, belong to the stockholders subject

to the rights of its mortgage and general creditors. In 1866 there was no specific statutory authority for granting permission to occupy the streets with street car lines. Des Moines then had but about 6,000 people, and it was about as large as any other city of the state; but Dr. Turner and others had confidence in its growth, and the then city council desired to aid in building up the city by enabling people to reside beyond the business district, so that the ordinance was enacted under a statute giving general control only over the streets. The system was thus inaugurated, and carried on for 14 years, with an expenditure of \$200,000, and no profits. Then when profits were in sight the council granted rights to other companies, and the litigation commenced. But the Iowa legislature by the Code of 1873, gave specific authority to the city councils over the streets as to street railways then and ever so necessary to the people. And since the adoption of the Code of 1873 there have been many recognitions by the city council of what was done in 1866."

In the case of *People v. O'Brien*, 111 N. Y. 1, 38, the court says:

"It will be convenient in the first instance to consider the nature of the right acquired by the corporation under the grant of the common council, with respect to its terms or duration. This is to be determined by a consideration of the language of the grant and the extent of the interest which the grantor had authority to convey. We think this question has been decided by cases in this court, which are binding upon us as authority in favor of the perpetuity of such estates. That a corporation, although created for a limited period, may acquire title in fee to lands or property necessary for its use was decided in *Nicoll v.*

N. Y. & Erie R. R. Co., 12 N. Y. 121, where it was held that a railroad corporation, although created for a limited period only, might acquire such title, and that where no limitation or restriction upon the right conveyed was contained in the grant, the grantee took all of the estate possessed by the grantor.

"The title to streets in New York is vested in the city in trust for the people of the state, but under the constitution and statutes, it had authority to convey such title as was necessary for the purpose, to corporations desiring to acquire the same for use as a street railroad. The city had authority to limit the estate granted either as to the extent of its use or the time of its enjoyment, and also had power to grant an interest in its streets for a public use in perpetuity, which should be irrevocable. (*Yates v. Van DeBogart*, 56 N. Y. 526; in re *Cable Co.*, supra)

"Grants similar in all material respects to the one in question have heretofore been before the courts of this state for construction, and it has been quite uniformly held that they vest the grantee with an interest in the street in perpetuity for the purposes of a street railroad. (*People v. Sturtevant*, 9 N. Y. 263; *Davis v. Mayor etc.*, 14 id. 506; *Milhau v. Sharp*, 27 id. 611; *Mayor etc. v. Second Ave. R. Co.*, 32 id. 261; *Sixth Ave. R. C. v. Kerr*, 72 id. 330.)"

And as applied to the particular franchise, the court, says:

"We are therefore of the opinion that the Broadway Surface R. Co. took an estate in perpetuity in Broadway through its grant from the city under the authority of the constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property within the

usual and common signification of that word. *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 id. 263) When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal; in which they have been upheld and enforced, there is no question but that in the view of legislatures, courts and the public at large certain corporate franchises have been uniformly regarded as indestructible by legislative authority and as constituting property in the highest sense of the term.

"It is, however, earnestly contended for the state that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the state. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country."

This case is cited with approval in *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 395

In *S. R. T. Co. v. Mayor etc.*, 128 N. Y., 510, 520, the court says:

"A striking feature of this public law, which authorizes the appropriation of the streets and lands within a county for railroad uses, when the necessity for such has been determined by public commissioners, is the imperative nature of the direction to construct, under the penalty of forfeiture, within the time fixed and upon the conditions set forth in its articles. How can a franchise so conferred by the legislature be deemed inchoate and defeasible? Is

not its possession an element of the security upon which capital has been subscribed and loans have been made to the company? The construction of this railroad has been proceeded with upon the plans of the commissioners and with reference to the projection of the route upon the line designated and consented to. The company's funds have been expended with reference to its road, being constructed upon the plans and routes designated by the public agents. In the case of the Broadway Surface R. R. (*People v. O'Brien*, 111 N. Y. 1) the corporate franchise, acquired under the authority of the legislature and the consent of the municipal authorities, to lay tracks and to run cars upon Broadway, was held by us to be a right indestructible by the legislature, and to constitute property in the highest sense of that term."

In *Govin v. City of Chicago*, 132 Fed. 848, 855, the court says:

"The language used in the section under consideration, must be read in view of this, the then prevailing idea respecting railway grants. Thus viewed, it constituted a clear and definite grant of authority to the companies to occupy the streets, a grant direct, and not by circumlocution; a grant by the legislature to the companies, not the grant of power to the city to grant in turn to the companies.

"True, the streets to be used are not set out by name; but they are set out by description, a description that fixes with certainty their identity as to the then past, and with equal certainty the means of identity as to the then future; and it is a universal maxim in law, that that is certain that can be made certain. True, also, that the grant is in the nature of a float, not attaching to any specific street until such street has been designated; but when the

street has been designated, the grant attaches as of the date of the act. In that sense, the grant is in praesenti. *U. S. v. Southern Pac. R. Co.*, 146 U. S. 593, 13 Sup. Ct. 152, 36 L. Ed. 1091; *St. Paul & N. P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 5, 11 Sup. Ct. 389, 35 L. Ed. 77. We cannot escape the judgment that the legislature intended, in this section, to grant to the companies named, directly out of its own plenary power over the subject matter, the streets designated, or to be designated, to the extent that the franchise granted was essential to the promotion of street railway facilities."

In *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296, 315, the Circuit Court of Appeals for the Sixth Circuit, speaking by Circuit Judge Lurton, says:

"The grant under the ordinance of December, 1871, was unlimited as to time. There was at that time no statutory restriction upon the power of a city to grant an unlimited street easement to either a railroad or street car company, having the requisite franchises from the state. The act limiting the power of a city to a term not exceeding 25 years was not passed until May 14, 1878. Neither do we think there was any implied restriction upon the power of the city, springing from reasons of public policy. The corporation to which this grant was made was perpetual, and we see no sufficient reason which would justify the court in holding that it was not within the discretion of the municipal government to grant to such a company an unlimited easement upon the streets."

This case is also a controlling authority upon the point that the rights evidenced by Ordinance No.

599 can be mortgaged, transferred or sold, as an easement or property right. The court, speaking upon that subject, says:

"That these street easements originate in certain statutes of the state of Ohio and certain ordinances of the city of Cincinnati does not affect their character as contracts entitled to the protection afforded by the constitution of the United States. The grant of a right to enter upon and occupy a public street with the necessary tracks, poles, wires, and equipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right capable, in the absence of express restrictions, of being sold, conveyed, assigned, or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or contract rights. Such a grant, as we had occasion to decide in *Detroit Citizens' St. Ry. Co. v. City of Detroit*, 22 U. S. App. 570, 580, 12 C. C. A. 365, 372, and 64 Fed. 628, 635, may be for a term longer or shorter than the corporate life of the company receiving it, the duration of the estate being dependent upon the terms of the grant and the power of the grantor to make it. We then said that there was 'nothing in the nature of the property rights involved in a grant of an easement in the streets for street railway uses which distinguishes it from other property acquired by a corporation in the exercise of its franchises.' "

To the same effect is *Railroad Co. v. Delamore*, 114 U. S. 501. The court in *City Railroad Co. v. Citizens' R. Co.*, 166 U. S. 557, expressed no opinion whether the complainant was entitled to a perpetual franchise from the city.

In *Citizens' St. R. Co. v. City of Detroit*, 64 Fed. 628, 646, the court construed a provision of the state constitution of Michigan which provided that no corporation, except for municipal purposes, or for the construction of railroads, plank roads and canals, should be created for a longer period than thirty years, and speaking of that proviso, the court says:

"It has been much debated as to whether street railways come within this prohibition. Street railways were practically unknown when the constitution was adopted. The provision referred to seems to except out of the limitation all that class of quasi public corporations to which a street railway belongs. The same reasons which would demand a long continuance of the powers of a commercial road, a canal, or a plank road, apply to a street railway. These considerations seem to indicate that a railway is not within the class of corporations to which the constitutional inhibition is applicable, and, if applicable at all, it is only so because the excepted corporations are specifically named. The spirit of the provision would include such companies within the exceptions. The legislature, by the limitation imposed upon the life of street railway corporations, was probably of opinion that the letter of the constitution operated to require them to apply the limitation, inasmuch as a street railway is not a commercial railway. In any view of the question, that constitutional provision does not afford evidence of any such strong public policy as should operate to impose a limitation upon the power of the city to make a grant of a right of way extending for 16 years beyond the corporate life of the grantee.

"The evils to be apprehended from long grants of easements to such companies seem to us not to be such as to justify a constructive limitation on that account. The power to make an irrevocable contract giving an easement of some considerable duration is an inseparable incident in any scheme for furnishing such public facilities as a street railroad. The duration of such grants must be a question of discretion to be exercised by some public authority. That the exercise of that discretion should be left to the local government as a question of purely local interest seems most consistent with the proprieties of the case, and most in accord with the decentralizing policy so peculiar to the state of Michigan."

If we apply this cogent reasoning to the case of a commercial railroad constructed and to be operated by a corporation created with perpetual duration, where, under a state statute, such railroad company is granted the right to use the streets of a municipality for the location and operation of such railroad, it is clearly seen that although the grant when given contains no limitation as to time on its face, such grant is of necessity perpetual.

It may be observed that Section 6841 and 6842 Lord's Oregon Laws, have never been repealed or modified, unless repealed by implication by legislative charters granted to municipalities in the State of Oregon. It is also true that until the adoption of the charter of the City of Portland, now in effect, on January 23, 1903, there was no limitation imposed by any charter as to the extent

or term for which a franchise could be granted to a railroad company, to locate, construct and operate a railroad in the City of Portland. This provision of the charter, (Page 12 Transcript) is clearly intended not to, and must be construed not to be retroactive. From 1862, when these provisions of the statute were adopted, until the present time, there has been no attempt to restrict or limit the duration of franchises to be granted by the state, and it was not until the adoption of the present charter of the City of Portland on January 23, 1903, that such attempt to limit franchises to be granted by the city, was carried into effect. If, therefore, Ordinance No. 16491, *supra*, is a modification or repeal of Ordinance No. 599, or if the rights of the company have been forfeited thereunder, by reason of a violation of any of the terms or provisions of such ordinance, it follows logically that the company would be without any right to maintain or operate its railroad on Fourth Street, and, although no franchise was tendered or offered to the complainant or its lessor, in lieu of the rights evidenced by Ordinance No. 599, any franchise tendered would necessarily be limited, under the terms and provisions of the present charter, and would be limited to a period of twenty-five years, and such grant would necessarily be burdened with the conditions and restrictions under the present charter by which any other railroad company could be granted a common user of the same tracks, under any new franchise that

might be offered. Not only so, but such franchise, under the present charter, would be subject to valuation, and the grantee would be compelled to pay not a license fee regulatory in character, under the police power of the state, but a price or value at which the franchise should be valued by the Executive Board of the city, and this value would be conclusive upon the applicant or grantee, and would become a part of the contract, if accepted by the grantee, and become an annual burden for a period of twenty-five years, and during the life of the franchise.

These circumstances show how important it is to protect and preserve the property rights created under the provisions of the state statute referred to, and evidenced by Ordinance No. 599, and how important it is that the valuable rights should not be taken from the owner by a legislative declaration, without judicial inquiry.

Capdevielle v. New Orleans & S. F. R. Co.,
110 La. 903

In Blair v. City of Chicago, 201 U. S. 400, the court construed certain ordinances passed by the City of Chicago. The court, speaking by Mr. Justice Day, says:

"The act under consideration nowhere assumes to fix the duration of the grant, nor excludes the conclusion that it is embraced in the terms and conditions which are to be fixed by contract with the city. If the franchise to use the streets, without regard to municipal action, was fully conferred by the

legislative act under consideration, then the company had only to take possession of the streets, subject to regulations as to running of cars, etc., by the city council. On the contrary, under the terms of this act, the city, by withholding its consent, could prevent the use of the streets by the corporations. No way is pointed out by which this consent could be compelled against the will of the council. That body might, for reasons sufficient to itself, under the terms of this act, by withholding assent, determine that it was undesirable to have the corporations in control of the use of the streets."

This recognizes the power granted under statutes similar to Sections 6841 and 6842 Lord's Oregon Laws. It should be noted that under these sections just cited, the railroad company could appropriate such portion of the street as might be necessary for the location, construction and operation of its railroad, *whether the city consented or not*, while under the statute and ordinance construed in the case last cited, in order to make the grant under the state statute effective, it was necessary that the city should give its consent, and in giving its consent, it could impose such terms and restrictions as in its judgment seemed advisable, and it could refuse its consent altogether.

In *City of Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 380, the court says:

"The property of railroad companies is as much within the protection of the law as that of any other company or of any individual. Railroads are recognized as essential to the

welfare and prosperity of the people, and because of their capacity for usefulness to the whole people, railroad companies are invested with large powers of a public nature. The laws of the state also provide for the organization of cities, and large powers are granted to them relating to the control and regulations of matters within the municipal limits; but, when a broad interpretation of such powers clashes with acquired property rights, as in this instance, such reasonable construction should be given them as shall not have the effect of destroying, or even materially injuring, such rights. The city must so use its powers as to enable the respondents to have a reasonable use and enjoyment of theirs, and not so as to render it impossible or even very difficult for the respondents to reconstruct and operate their railroads. - 1 Rorer, Railroads, p. 553, par. 13. Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for, should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which, at the same time, affords protection to

the rights of the respondents. *State v. Noyes*, 47 Me. 189; *Port of Mobile v. Louisville, etc. R. R. Co.*, 84 Ala. 115 (4 South Rep. 106)."

In *Louisville v. Cumberland Telephone Co.*, 224 U. S. 649, 662, Mr. Justice Lamar, speaking for the court, says:

"The plaintiff in error makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void ab initio, or revocable at the will of the General Council, or that it expired in 1893 when (Ky. Stat. 1909, Sec. 2742) Louisville was made a city of the first class with new and enlarged power. In support of this proposition numerous decisions are cited, in some of which it appeared that a state had chartered a public utility corporation, but the city by ordinance had given an exclusive or perpetual grant of a street franchise which was held to be void because made in excess of the statutory power possessed by the municipality. In others the company had been incorporated for thirty years, and the street right was held to have been granted only for that limited period. In others it was decided that such privileges terminated with the corporate existence of the municipality through whose streets the rails and tracks were to be laid. *Detroit Citizens' St. Ry. v. Detroit Railway*, 171 U. S. 48, 54; *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63; *Blair v. Chicago*, 201 U. S. 400; 3 Dill. Mun. Corp., Secs. 1265-1269.

"None of these decisions are applicable to a case like the present, where the Ohio Valley Telephone Company, with a perpetual charter, has received, not from the municipality, but from the State of Kentucky, the grant of

an assignable right to use the streets of a city which remains the same legal entity, although by a later statute it has been put in the first class and given greater municipal powers. *Vilas v. Manila*, 220 U. S. 345, 361.

"In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at the will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

"This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for

the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville. Such has been the uniform holding of the courts construing similar grants to like corporations. *Milhau v. Sharp*, 27 N. Y. 611 (1863); *Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 303; *Mobile v. L. & N. R. R. Co.*, 84 Ala. 122; *Seattle v. Columbia & P. S. R. R.*, 6 Wash. 379, 392; *People v. Deehan*, 153 N. Y. 528. The earlier cases are reviewed in *Detroit St. R. R. v. Detroit*, 64 Fed. Rep. 628, 634, which was cited with approval in *Detroit v. Detroit St. R. R.*, 184 U. S. 368, 395, this court there saying that 'Where the grant to a corporation of a franchise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee.'

"The right to conduct a telephone exchange and to use the streets of the city of Louisville, which had been vested by law in the Cumberland Telephone & Telegraph Company, could not be impaired or forfeited by an ordinance of the General Council."

VI.

This railroad line on Fourth Street is a part of the road designated and required to be built under the Act of Congress of May 4, 1870, (16 Stat. at Large, 94) and is there pursuant to this Act and the laws of the state, and cannot be abandoned by the company or its successors, even if they desired so to do. The City of Portland cannot deprive the company or its successors of the use of this portion of its rights under the Act of May 4, 1870, and the laws of the state under which the Oregon Central Railroad Company was incorporated. The

operation of this road as a commercial road necessarily includes the use of steam locomotives and freight trains. Such use and operation, pursuant to this Act of Congress and the laws of the state, is subject only to reasonable regulation under the police power of the state or city, which does not amount to prohibition of the substantial use of such instrumentalities.

3 Dillon on Municipal Corp. Secs. 1269, 1270.

Destruction of the right to operate this railroad between its termini would deprive the company of its right, not only to operate its railroad as a commercial road leading from Corvallis, in Benton County, nearly one hundred miles distant, but would burden and restrict to that extent any interstate business moving over that line. It is freely conceded that under the police power the state or city, as the case may be, may reasonably regulate the use of the right and may, in that behalf, reasonably limit the time when steam locomotives may be used upon this street, and may reasonably limit the time when freight trains may be operated thereon, but such regulations must be consistent with the substantial use and enjoyment of the rights granted.

In *Wisconsin Telephone Co. v. City of Oshkosh*, 62 Wis. 32, 40, the court aptly says:

"But we do not think this was designed as giving to the municipality absolute authority to remove such poles and wires entirely from the city, nor to exclude such companies alto-

gether from carrying on or operating their business within the corporate limits of the city, but simply to regulate the same, and to prohibit such location in improper places. Otherwise the municipalities of the state would have the power to nullify what the legislature had expressly authorized.

"Undoubtedly the common council, under the charter, had the right to regulate, in order to guard and secure the public safety and convenience, but their regulations, to be valid, should have been reasonable and fair, and not have gone to the extent of confiscation, nor of wholly excluding the plaintiff from the city."

This quotation is particularly apt, as it applies to the attempt upon the part of the city by the ordinance complained of, to prohibit the substantial and valuable use of the necessary instrumentalities of the business in which the complainant is engaged, and for which the Oregon Central Railroad Company and its successors were incorporated.

VII.

Even if it be conceded that the city could, under the police power, prohibit the use of steam locomotives on Fourth Street, it could not, as it attempted to do under Ordinance No. 16491, deprive the company of its right, under reasonable regulations, to move its freight trains at some time during the twenty-four hours. Such a prohibition is a taking of the property of complainant, under the guise of the exercise of the police power; it is not regulations, it is confiscation.

This principle is well illustrated in *State ex rel Wisconsin Tel. Co. v. City of Sheboygan*, 111 Wis. 23, 36; also in *Wisconsin Telephone Co. v. City of Oshkosh*, 62 Wis. 32, 40, and other cases cited under Point VII.

In *American Union Tel. Co. v. Harrison*, 31 N. J. Eq. 627, the court says:

"The design is to invest telegraph companies with the right to use the streets of an incorporated town for the purpose of erecting their poles therein, subject, nevertheless, to such municipal control as shall be necessary to secure to the public, safety, convenience and freedom in the use of the streets. The municipal authorities may say what streets shall be used, at what points in the streets the poles shall be erected, and how they shall be planted and secured, but they have no power to lay an embargo. They have a right to regulate, but not to interdict. And their regulations, to be valid, must be reasonable and fair."

See also *Township of Summit v. N. Y. & N. J. Tel. Co.*, 57 N. J. Eq. 123

VIII.

If Ordinance No. 16491 be invalid in respect to the prohibition against the movement of freight traffic, then the entire ordinance is void. It is a fundamental rule that if part of an ordinance is void, another essential and connected part of the same is also void. Where an ordinance or statute is couched in terms so broad as to exceed the limitation of the powers of the Council or legislature to enact the same, the court will not by construction

limit the statute to the scope which might constitutionally be given it by the Council or legislature, but will hold the ordinance or statute unconstitutional and void.

This principle is particularly applicable to a case where, as here, two acts are prohibited by the terms of the same section, and where the punishment or penalty for these two acts, when separately or collectively committed, is defined in another section, and where it is impossible to assume that the Council would have enacted the one without the other, and where it is impossible to separate the legal from the illegal provisions.

In *State v. Mayor of Hoboken*, 38 N. J. L. 111, the court says:

"They fall within the rule that if part of a by-law, ordinance or resolution be void, another essential and connected part of the same by-law, ordinance or resolution is also void. Dillon's Mun. Corp. Section 354."

In *United States v. Ju Toy*, 198 U. S. 253, 262, the court says:

"But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

See also *Illinois Cent. R. R. Co. v. McKendree*, 203 U. S. 514,

The prohibition of the operation of steam loco-

tives or freight cars is contained in a single section, and the penalty for the operation of steam locomotives or freight cars is contained in a separate section. It is impossible to separate the two acts attempted to be prohibited or punished. In such cases if either thing prohibited or punished is not within the legislative power, the statute is void.

IX.

A court of equity has power to protect private property, and to enjoin a continuing injury to property or business, and where a criminal prosecution is threatened or invoked, to prevent the exercise of civil rights conferred by law, injunction is the proper remedy to prevent injury to the property or business thus menaced.

In *City of Bessemer v. Bessemer Waterworks Co.*, 152 Ala. 391, 402, the court says:

"The jurisdiction of equity to protect a vested franchise from unlawful invasion or disturbance, upon the ground of irreparable injury, or such injury as cannot be adequately estimated in damages at law, seems to be recognized by our decisions," citing many cases.

In *Millville Gas Light Co. v. Vineland Light & Power Co.*, 72 N. J. Eq. 305, 307, the court says:

"Legislative grants of franchises of the nature claimed by complainant, whether granted by special charters or under general laws, confer privileges which are necessarily exclusive in their nature as against all persons upon whom similar rights have not been conferred,

for any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a *direct invasion of the private property rights of those upon whom the franchises have been so conferred*," citing many cases.

Also,

"It follows that if complainant is at this time entitled to exercise in the disputed territory the privileges set forth in the legislative act referred to, and defendant, as claimed, enjoys no legislative sanction for the conduct sought to be enjoined, complainant will be entitled to the relief prayed for."

In *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 82, the court says:

"It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

In the case at bar the city was actually prosecut-

ing the General Manager of the complainant, under the terms of the ordinance in question. He was subject to arrest while engaged in the operation of this railroad pursuant to law. He was but asserting the rights of the company, and the rights of the public in that behalf. The penalties denounced by the ordinance are extremely severe and cumulative, and repeated prosecutions would not only imprison the officer in charge of the property, and responsible for its operation, but would interrupt and destroy the business of complainant, under the grave penalty of forfeiture of all rights under Ordinance No. 599, and under the laws of the state. Under these circumstances a court of equity has clear and undoubted jurisdiction.

To the same effect is *Railroad Company v. Town of Triadelphia*, 58 W. Va. 487. See also

Vicksburg v. Vicksburg Waterworks Co.,
202 U. S. 453, 460

Detroit v. Detroit Citizens' St. Ry. Co., 184
U. S. 368, 381

Southern Bell T. & T. Co. v. City of Mobile,
162 Fed. 523, 532

*Des Moines City Ry. Co. v. City of Des
Moines*, 151 Fed. 854

We need not discuss further the legal questions involved and set out under Points X, XI, XII and XIII.

CONCLUSION

The trial court in its opinion, (Pages 27, 28, 30 Transcript) erroneously assumed, as it seems to us, that the city was vested with the right and power at the time Ordinance No. 599 was passed, to designate the street upon which the company should locate its road, and this carried with it the power to impose reasonable conditions to such grant or permission, which, when accepted by the grantee, became binding upon it.

An examination of Sections 6841 and 6842 Lord's Oregon Laws, shows that the city did not have any power to designate the street, if the parties were unable to agree. It was only where the parties were able to agree that the city could designate the street or portions thereof which might be appropriated by the railroad company. In other words, the grant by the Legislative Assembly was absolute and unqualified when the parties failed to agree as to the street to be used. If they agreed upon the location, they could perhaps, for the company *and the state* agree upon the terms and conditions of such use, but the right granted was derived from the state, and the only right that could be exercised by the city was that reserved in the grant, and which the state or city could not part with under the police power. It therefore must be assumed, as it seems to us, that the only right that was reserved to the city was that right of police regulation which the parties attempted to define by the

terms and provisions of Ordinance No. 599. If in the exercise of the police power something more could be done by the state or city, it is in the way of regulation, and not in the way of impairment or destruction of the use. The city as such, under Sections 6841 and 6842 Lord's Oregon Laws, *supra*, could make or impose no conditions or terms and could exercise no legislative power, excepting possibly such as may be implied in the exercise of the police power. These terms and conditions arose not upon contract, excepting in so far as the right to contract upon the part of the city may be incident to the designation of the particular road, street, alley or public grounds to be used. The city had no other power under either section than to designate the street or portion thereof, if satisfactory to the railroad company. The city had no such power as is conferred upon the county court under section 6841 with reference to roads, streets, alleys, or public grounds which are not within the corporate limits of a municipal corporation. It is, of course, fundamental that the county court, in respect to this matter, had no legislative power and, we take it, the city under section 6842 had no legislative power as such. There seems to be a distinction between the authority conferred upon the county court as to the highways and public grounds in the county and within the limits of an unincorporated town and such highways and public grounds within the corporate limits of a municipal corporation. The former was under the jurisdic-

tion of the county court without legislative power but with the power to contract upon the extent, terms and conditions upon which railway company might use the street, road, alley or public grounds. The local authorities, however, of a municipal corporation could only designate the particular road, street, alley or public grounds or a portion thereof to be used, and if they failed or refused to make such designation, when requested, the railway company could make such appropriation notwithstanding. Although this distinction is not very clearly made such would seem to be the true construction of these two sections.

- Douglas County Road v. Canyonville & G.
Co. 8 Or. 102;
Canyonville & G. Road v. Stephensen, 8 Or.
264;
Douglas County Road v. Abraham, 5 Or.
319;
Paquet v. Mt. Tabor St. Ry. Co. 18 Or. 233;
McQuaid v. Portland & Vancouver Ry. Co.
18 Or. 237;
Turney v. Southern Pacific Co., 44 Or. 280;
Willamette Iron Works v. Oregon R. & N.
Co. 26 Or. 227;
Tillamook County v. Wilson River Road Co.
49 Or. 309;
State vs. Douglas Co. Road Co. 10 Or. 185;
Oregon Ry Co. vs. City of Portland, 9 Or.
231.

The case resolves itself primarily into the question of whether or not it was a reasonable regulation under the police power, to prohibit the com-

plainant from the operation of steam locomotives at any time, and the movement of freight traffic at all times, on Fourth Street. We may therefore summarize our conclusions as follows:

FIRST: The franchise owned by the Oregon Central Railroad Company was granted by the state, under the provisions of Sections 6841 and 6842 Lord's Oregon Laws.

SECOND: The charter of January 23, 1903, under which the City of Portland attempted to pass Ordinance No. 16491, did not amend, modify or repeal Sections 6841 or 6842 Lord's Oregon Laws, or abrogate any of the essential rights evidenced by Ordinance No. 599.

THIRD: The rights granted under the state statute, evidenced by Ordinance No. 599, constituted an irrevocable franchise or contract, which could not be altered, impaired or modified, and when accepted by the grantee, became a vested property right, which could be assigned, conveyed, mortgaged, sold, leased, or otherwise disposed of in the same manner and for the same purposes as any other property of this kind.

FOURTH: It was not within the reasonable exercise of the police power of the city or state, to prohibit the operation of steam locomotives, or the movement of freight traffic, on this street; such prohibition would not be a reasonable regulation of an existing right.

FIFTH: The rights granted by the state statute, and evidenced by Ordinance No. 599, could not be destroyed by an ordinance declaring the use and operation of steam locomotives, or the movement of freight traffic, a nuisance. Nor could the Council, under the police power, attempt to prohibit such use, under penalty of forfeiture.

SIXTH: The rights granted by the state statute, and evidenced by Ordinance No. 599, were assignable, and the City of Portland has ratified the assignment, and is estopped to dispute the assignability of this franchise, and that complainant has no rights thereunder.

SEVENTH: By Section 106 of the Act of January 23, 1903, now in effect, the City of Portland has ratified and confirmed Ordinance No. 599, and recognized and ratified its continuance in force and effect, as originally granted.

EIGHTH: The franchise granted by the state statute, and evidenced by Ordinance No. 599, is one in perpetuity.

NINTH: Ordinance No. 16491 infringes upon the right of complainant and its predecessor to operate its railroad on Fourth Street, and is contrary to the obligation imposed upon the railroad company by the Act of Congress of May 4, 1870, and by the laws of the state.

TENTH: The prohibition of the right to operate steam locomotives or move freight traffic on this

street, under the guise of the police power, is a taking of the property of complainant; it is not regulation; it is confiscation.

ELEVENTH: Ordinance No. 16491 is invalid if either thing prohibited to be done is not within the power of the city. Even though it may be within the police power to prohibit the movement of steam locomotives at all times, it is so connected with the prohibition against the movement of freight traffic, as that the ordinance is void for that reason, if it is not within the power of the Council to prohibit the movement of freight traffic.

TWELFTH: A court of equity has jurisdiction to prevent threatened wrong and the invasion of the rights of complainant.

THIRTEENTH: Ordinance No. 16491 impairs a vested property right of complainant, deprives the complainant of its property without due process of law, and denies to complainant the equal protection of the law.

FOURTEENTH: When the manner of enforcing municipal regulations is prescribed by law, such method is exclusive, and by Section 5, of Ordinance No. 599, the manner of enforcing the same is prescribed, and this manner is exclusive. In case of violation of its terms by the railroad company, such violation can be prohibited, or the terms of the ordinance enforced by a suit or action in the name of the city, or in the name of the state, on the relation of the city, and not otherwise.

FIFTEENTH: Ordinance No. 16491 is an ex post facto law, in that it imposes an additional penalty to that prescribed in Ordinance No. 599.

SIXTEENTH: Ordinance No. 16491 is void in that it alters the existing remedy under Ordinance No. 599, to such an extent as materially to effect the rights of the railroad company. The remedy prescribed in Ordinance No. 599 for the enforcement of the contract is a part of such contract, and such remedy cannot be so limited or changed so as to impair the contract.

SEVENTEENTH: The penalties prescribed by Ordinance No. 16491 are in excess of the power or authority of the Council, under its charter of January 23, 1903, in this, that in addition to fine and imprisonment, it attempts to impose a forfeiture of any and all rights and privileges claimed by the railroad company under Ordinance No. 599.

For these reasons we respectfully submit that the decree of the court below should be reversed.

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APPENDIX.

ORDINANCE No. 599.

An ordinance Authorizing the Oregon Central Railroad Company of Portland, to Lay a Railroad Track and Run Cars Over the Same, Within the City of Portland.

The City of Portland does ordain as follows:

FRANCHISE-ROUTE

Section 1. The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland, to the north side of "G" Street, and as much farther north as said Fourth Street may extend or be extended, upon the terms and conditions as hereinafter provided.

GRADE AND REPAIRS.

Section 2. The said railroad company shall grade to established grades, construct and maintain in good repair said street, at least six feet in width upon each side of the center line of said street, and as much wider as may be affected by said railway or the construction thereof, and shall do and perform said work and the improvement and the repair thereof in such manner and as often as the Common Council of the City of Portland may at any time provide for or require.

Section 3. The Common Council reserve the right to make or to alter regulations at any time as they deem proper for the conduct of said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the

running of locomotives at such time and in such manner as they may deem necessary.

Section 4. All alteration of grades or streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of the said railroad company, and the same shall be made as may be provided by ordinance.

Section 5. It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance, the forfeiture of the same, and to cause the said rails to be removed from said street.

Approved Jan. 6th, 1869.

ORDINANCE No. 16491.

An Ordinance prohibiting the operation of steam locomotives and freight cars on Fourth Street between Glisan Street and the southerly limits of the City of Portland after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof.

The City of Portland does ordain as follows:

Section 1. It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, or any other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after eighteen months from the final passage and ap-

proval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.

Section 2. Any violation of the provisions of this ordinance by the owners, officers, agents or employes of said Oregon Central Railroad Company, or its successors, assigns, or lessees or any other person, firm or corporation, by so running or operating steam locomotives or freight cars (other than those excepted in section 1 hereof), or attempting to run or operate the same on said Fourth Street after the time mentioned in section 1 of this ordinance, shall be punishable by a fine of not less than \$250.00, nor more than \$500.00, or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotives or freight cars, shall constitute a separate offense, and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.

Section 3. This ordinance shall not be construed so as to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway, or the use, operation, or running of any railway car or cars, motor or motors, locomotive or locomotives, or other railway vehicle or vehicles in, on, over, along or upon said Fourth Street heretofore, now or hereafter claimed, alleged or set up by any person, persons, firm or corporation.

Lord's Oregon Laws, Section 227.

What property liable to execution and what exempt.

All property, including franchises, or rights or interest therein, of the judgment debtor, shall be liable to an execution, except as in this section provided. The following property shall be exempt from execution, if selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon thereafter before sale thereof as the same shall be known to him and not otherwise:— * * * * *

Lord's Oregon Laws, Section 6679.

Private corporations authorized.

Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit or occupation, they may do so in the manner provided in this act. (L. 1862, D. p. 658, § 1; H. § 3217; B. & C. § 5052.

Lord's Oregon Laws, Section 6680.

Articles of Incorporation, How Made and Filed.

Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgement of a deed, and shall file one of such articles in the office of the secretary of state, and cause the same to be recorded by him in a book to be kept in his office for that purpose, and shall file another with the clerk of the county where the enterprise, business, pursuit, or occupation is proposed to be carried on, or the principal office or place of business is proposed to be located, and cause the same to be recorded by him in a book to be kept in his office for that purpose, and shall retain the third in the possession of the corporation. (L. 1862; D. p. 658, § 2; L. 1891, p. 110, § 1; H. § 3218; B. & C. § 5053.)

Lord's Oregon Laws, Section 6683.
Articles of Incorporation, What to Specify.

The articles of incorporation shall specify,—

1. The name assumed by the corporation and by which it shall be known, and the duration of the corporation, if limited;

2. The enterprise, business, pursuit, or occupation in which the corporation proposes to engage;

3. The place where the corporation proposes to have its principal office or place of business;

4. The amount of the capital stock of the corporation;

5. The amount of each share of such capital stock;

6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal, or bridge, the termini of such navigation, road, canal, or the site of such bridge. (L. 1862; D. p. 659, § 4; H. § 3220; B. & C. § 5055.)

Lord's Oregon Laws, Section 6686.

Powers of the Body Corporate.

Upon making and filing the articles of incorporation, as herein provided, the persons subscribing the same are incorporators, and authorized to carry into effect the objects specified in the articles, in the manner provided in this chapter; and they and their successors, associates, and assigns, by the name assumed in said articles, shall thereafter be deemed a body corporate, with power—

1. To sue and be sued;

2. To contract and be contracted with;

3. To have and use a corporate seal, and the same to alter at pleasure;

4. To purchase, possess, and dispose of such

real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation, and to take, hold, and possess, and dispose of all real and personal property donated to such corporation by the United States, or by any state, territory, county, city, or other municipal corporation, or by any person, firm, association, or private corporation, for the purpose of aiding in the objects of such corporation;

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation;

6. To make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment, or execution; provided, that no such sale shall be made without thirty days' notice of the time and place of sale in some newspaper in circulation in the neighborhood of such company for the transfer of its stock, for the management of its property, and for the general regulations of its affairs;

7. In case the object or purpose for which any such corporation is incorporated is in whole or in part to construct, or construct and operate a railroad, to lease any part or all its road to any other company incorporated for the purpose of maintaining and operating a railroad, and to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company upon such terms and conditions as may be agreed upon between said companies respectively Any two or more railroad companies whose lines are connected may perfect any arrangement for their common benefit to assist and promote the object for which they were created; provided, that nothing in this act shall be con-

strued to authorize the leasing of any railroad line to any company or corporation owning a road which forms a competing or parallel line to its railroad. (L. 1864; D. p. 659, § 5; L. 1878, p. 90, § 1; L. 1887, p. 14, § 1; H. § 3221; B. & C. § 5056.)

Lord's Oregon Laws, Section 6841.

Public Grounds, Streets, Etc., May be Appropriated.

When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street, or alley, or public grounds, the county court of the county wherein such road, street, alley, or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road. (L. 1862; D. p. 666, § 26; H. § 3242; B. & C. § 5077.)

Lord's Oregon Laws, Section 6842.

Streets, Etc., in Corporate Towns, Proceedings to appropriate.

Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street, or alley, or public grounds, within such town as the local authorities mentioned in the last section and having charge thereof shall

designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto. (L. 1862; D. p. 666, § 27; H. § 3243; B. & C. § 5078.)

Bellinger and Cotton's Codes, Section 5068.

Corporations Continue, After Dissolution, for Certain Purposes.

All corporations that expire by limitation specified in their articles of incorporation, or are dissolved by virtue of the provisions of section 5070, or are annulled by forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending actions, suits, or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business. (L. 1862, D. Cd. p. 663, § 17; L. 1878, p. 91, § 2; H. C. § 3233.)

Bellinger and Cotton's Code, Sec. 5070.

Majority May Determine Amount of Stock or Dissolve Corporation.

Any corporation organized under the provisions of this chapter may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation, and the settling of its business and disposing of its property, and dividing its capital stock in any manner it may see proper. (L. 1864, D. Cd. p. 663, § 19; L. 1866, p. 38, § 1; H. C. § 3235.)

The Charter of the City of Portland, January 23, 1903.

Duration of franchise and compensation therefor; terms of grant; city empowered to acquire plant or property.

Section 95. No franchise, lease or right to use the water front, ferries, wharf property, land under water, public landings, wharves, docks, highways, bridges, avenues, streets, alleys, lanes, parks or any other public place, either on, through, across, under, or over the same, nor other franchise shall be granted by the city to any private corporation, association or individual except as in this Charter otherwise provided, for a longer period than twenty-five (25) years nor without fair compensation to the city therefor, and in addition to the other forms of compensation to be therein provided the grantee may be required to pay annually to the city such percentage of the gross receipts arising from the use of such franchise and of the plant used therewith as may be fixed in the grant of said franchise. Every grant of a franchise shall fix the amount and manner of the payment of the compensation to be paid by the grantee for the use of the same and no other compensation of any kind shall be exacted for such use during the life of the franchise, but this provision shall not exempt the grantee from any lawful taxation upon his or its property, nor from any license, charges or impositions not levied on account of such use. Every grant of a franchise or right and every contract therefor made or granted under the provisions of this Charter shall provide that at the expiration of the term or period for which it is made or granted the city at its election and upon the payment therefor of a fair valuation thereof to be made in the

manner provided therefor in the grant or contract may purchase and take over to itself the property and plant of the grantee in its entirety and which may be situated on, in, above or under the streets and public places aforesaid or any thereof and used in connection therewith but in no case shall the value of the franchise of the grantee be considered or taken into account in fixing such valuation or such grant and contract in pursuance thereof may provide that upon the termination of said franchise, or right, granted by the city, the plant as well as the property, if any, of the grantee situated on, in, above or under the public places aforesaid and used in connection therewith shall thereupon be and become the property of the city without any compensation to the grantee, upon an ordinance duly enacted authorizing the same and upon its paying to the grantee said valuation; provided, however, that before the city shall have authority to take over such plant or property, the question whether or not the city shall acquire or take such plant and property shall first be submitted to the voters of the city in accordance with and subject to the foregoing limitations of this Article; and provided, further, that the question whether or not the city shall acquire or take such plant or property must be submitted to the voters of the city as above provided without such ordinance, whenever a petition shall be filed with the Council subscribed by a number of electors of the city equal to 15 per centum of the votes cast at the last preceding election asking that such question shall be submitted for approval or rejection to the vote of the people. Such ordinance must be passed or such petition filed within one year prior to the expiration of such grant or franchise and within a sufficient time before the expiration of such year so that if a special election is re-

quired to be held to pass upon such question, the same can be held within six months prior to such expiration. Such petition shall be sufficient if it conforms to the requirements of sections 53 and 54 of this Charter as to the petition therein provided for. Every grant reserving to the city the right to acquire the plant as well as the property, if any, of the grantee situated in, on, above or under the streets, avenues, or other public places of the city shall in terms specify the method of arriving at the valuation therein provided for and shall further provide that upon the payment by the city of such valuation the plant and property so valued, purchased and paid for shall become the property of the city by virtue of the grant and payment thereunder and without the execution of any instruments of conveyance and every such grant shall make adequate provision by way of forfeiture of the grant, or otherwise, or the effectual securing of efficient service and for the continued maintenance of the property in good order and repair throughout the entire term of the grant; but the terms of this section so far as they relate to the acquisition of the plant, property and business of the grantee shall not apply to the rights given railroads under sections 102 and 103 of this Charter.

Ordinance embodying franchise to be published.

Section 97. Before any grant of any franchise or right to use any highway, avenue, street, lane, or alley or other public property, either on, above or below the surface of the same shall be made, the proposed specific grant shall be embodied in the form of an ordinance, with all the terms and conditions, including all provisions as to rates, fares and charges, if any, which proposed ordinance shall be published in full at the expense of the applicant

for the franchise, at least twice in the city official newspaper. Such publication shall take place and be completed not less than twenty nor more than ninety days before the final passage of such ordinance, and such ordinance shall require for its passage the affirmative vote of at least two-thirds of all the members of the Council, as shown by the "yeas" and "nays", and the approval of the Mayor before it shall be valid for any purpose; but in case the Mayor should veto any such ordinance it can only be passed over such veto by a four-fifths vote of all the members of said Council, in which case the same may be valid without the Mayor's approval from any (and) after such passage. No amendment to any franchise after publication shall be valid unless the ordinance as amended shall be republished in like manner and for like time as the original.

Taxation; requirements of all franchises; street repair, abandonment.

Section 100. Every franchise granted under this Charter shall be taken and deemed as property and shall be subject to taxation as property. Franchises granted to persons or corporations to construct, maintain and operate street railways and other railways and tramways shall provide that the grantee of the franchise or his or its assigns, representatives and successors shall keep those portions of the streets or other public places occupied by said street railways or other railways or tramways in good repair and as required by the Council, and that all persons or corporations to whom franchises are granted to lay down tracks for street railways or other railways and their or its representatives or successors, shall during the life of such franchise, plank, pave, repave, reconstruct or otherwise improve or repair or maintain in good condi-

tion and in the manner directed by the Council and by the Executive Board the whole or any portion of the streets along or over which said street railways or other railways shall be constructed, lying between the rails of any track thereof and extending one foot outside of such rails, and also the portions of the street lying between any two tracks; but in the cases of the franchise or rights granted under sections 102 and 103 of this Charter it may be provided in said franchise that said grantee or his or its assigns, representatives and successors shall pave, repave and keep in repair as required by the Council the streets used by such railroad from curb to curb.

Such franchise shall contain a provision that in the event any street, or portion of a street, of other public place, granted by said franchise and used by such grantee, his or its representatives and successors, shall during the life of the franchise be abandoned by such grantee, his or its successors or assigns, such grantee, or his or its successors or assigns shall forthwith be required to remove its tracks and other property therefrom and on the removal thereof restore, repair or reconstruct that portion of the street which under his, its or their franchise was to be kept in repair by the grantee, their, his or its successors or assigns so that it shall be placed in such condition as may be required by the Council and shall contain a provision to the effect that a failure to comply within a reasonable time with any of the provisions or conditions of such franchise shall authorize the city to declare an immediate forfeiture of such franchise and in the case of said street railways, or other railways or tramways the road or track constructed thereunder shall likewise be forfeited, or in case of such failure or neglect or refusal of the grantee after thirty days' notice given by

the Council to repair, improve or maintain as above set out the portions of the streets above described then that the said city may at its option do such work and the cost of the same as ascertained and declared by the Council shall be entered in the docket of City Liens and enforced in like manner and with like effect as a general tax upon real or personal property of the grantee after delinquency.

If any street or public place be abandoned as aforesaid, that portion of the franchise under which said street or public place was used by the grantee or his successors shall thereafter be null and void, and shall be forfeited without any further action on the part of the city. On any street or public place being abandoned as aforesaid, the City Engineer shall forthwith file with the Auditor a certificate, giving date of abandonment and description of the street or public place so abandoned, and the Auditor shall forthwith file the same and enter a notation thereof on the records of such franchise in his office. Such franchise shall also contain a provision that if electrical currents are used or employed in or about the use of said franchise or the plant connected therewith, then that the said grantee, his, its or their successors or assigns shall provide and put in use such means and appliances as will control and effectually contain such currents in their proper channels and on his, its or their own wires, tracks and other structures (so as to prevent injury to the property, pipes and other structures belonging to the City of Portland or to any person, firm or corporation within said city and to repair and renew said means and appliances and from time to time change and improve the same as may be necessary to accomplish said purpose, all at his, its or their charge and expense and at his, its or their own risk, selecting and adopting such means and

appliances as shall prevent injury to the property, pipes and other structures belong (belonging) to said City of Portland or to any person, firm or corporation.

Further requirements to be stated in ordinance; time of construction; cost; and time of completion of work in certain cases.

Section 101. In addition to the conditions otherwise required by this Charter and such other conditions as may be prescribed by the Council, franchises must provide for the time of beginning the construction of work thereunder, the estimated total cost of such work, the monthly or yearly sums of money to be expended thereon, and in case of franchise running to railroad companies, street-car companies and other companies, covering certain streets or portions of streets in such franchises described, fix the time within which the work to be done under such franchise shall be completed upon such streets or portions of streets so described therein.

Council empowered to make agreements with railroads as to use of streets.

Section 103. The Council has power and authority by ordinance duly passed to agree with any corporation, firm or person constructing a commercial railroad and desiring to enter the city, upon the extent, terms and conditions upon which the streets, alleys or public grounds of the city may be appropriated, used or occupied by such railroad, and upon the manner, terms and conditions under which the cars and locomotives of such railroad may be run over and upon such streets, alleys and public grounds; such agreement shall be subject to the provisions and requirements of sections 95, 97, 100 and 101 of this Charter. No

exclusive right for the aforesaid purposes shall be granted to any corporation, firm or person and the use of all such rights shall at all times be subject to regulation by the Council.

In addition to the other requirements of this Charter, every ordinance granting such right shall be upon the condition that such grantee shall allow any other railroad company to use in common with it the same track or tracks upon obtaining the consent of the Council expressed by ordinance, each paying an equitable and proper portion for the construction and repair of the tracks and appurtenances used by such railroad companies jointly.

Forfeiture of franchises not used.

Section 106. All franchises or privileges heretofore granted by the city which are not in actual use or enjoyment or which the grantees thereof have not in good faith commenced to exercise are hereby declared forfeited and of no validity unless said grantees or their assigns shall within six months after this Charter takes effect, in good faith commence the exercise or enjoyment of such grant or franchise. Nothing in this Charter contained shall affect the validity of any franchise, right or privilege in actual use or enjoyment heretofore given or granted by any former or the present City of Portland or by the City of East Portland or by the City of Albina, and the same shall be and continue in force and effect as given or granted by said cities or either of them.

Section 6735, Lord's Oregon Laws:

"Any foreign corporation incorporated for the purpose of constructing or constructing and operating, or for the purpose of or with the power of acquiring and operating, any railway, macadamized road, plank road, clay

road, canal, or bridge, or for the purpose of conducting water, gas, or other substance by means of pipes laid under the ground, shall, on compliance with the laws of this state for the regulation of foreign corporations transacting business therein, have the same rights, powers, and privileges in the exercise of the rights of eminent domain, collection of tolls, and other prerogative franchises, and in the control, management, and disposition of their business franchises and property, as are possessed by corporations organized for similar purposes under the general incorporation laws of this state; *provided* always, that in the case of the leasing of any line of railroad incorporated under the laws of this state by a foreign corporation, such leasing shall be upon the fundamental condition following, and not otherwise:

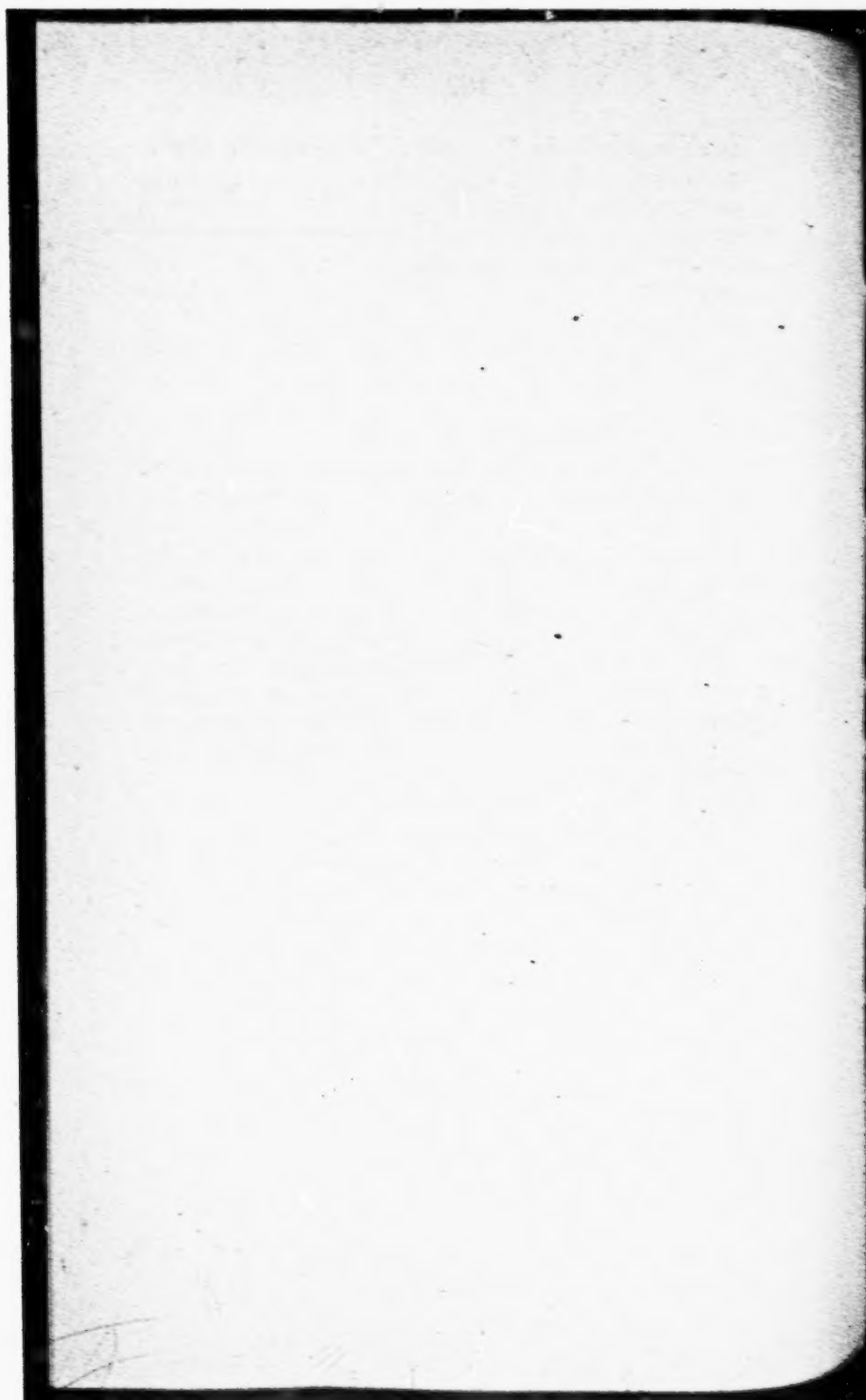
1. That such foreign corporation shall enter into an agreement in writing with the state of Oregon, duly executed by said corporation, to be signed by its president and attested by its secretary, which agreement shall be filed with the secretary of state of the state of Oregon, whereby and wherein said foreign corporation shall agree that in all suits or actions, by and between said foreign incorporation and a citizen or citizens of this state, during the continuance of such lease, shall be prosecuted or defended to a final determination in the courts constituted by the laws of this state, excepting in cases when such action or suit shall be commenced in or removed to the federal courts by a citizen of this state, and upon the failure to comply with the terms of such agreement by such foreign corporation, such lease shall utterly determine and be rendered null and void at the option of the legislative assembly of the state of Oregon;

2. That the state of Oregon reserves to itself, through its legislative assembly, and in

such manner as it shall determine, the right, power, and authority to prescribe the rate to be charged for the transportation of persons and property on such leased lines, and also to prescribe and make such police regulations for the government of such roads as it may from time to time determine. (L. 1878, p. 95, Sec. 1; L. 1887, p. 13, Sec. 1; H. Sec. 3293; B. & C. Sec. 5120.)

Section 6736, Lord's Oregon Laws:

"Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations any other or further rights, powers, or privileges than may be acquired or exercised by corporations incorporated under the laws of this state; but only so as to give to foreign corporations the same rights, powers, and privileges, on a compliance with the laws of this state, as may be acquired or exercised by corporations incorporated under the laws of this state. (L. 1878, p. 96, Sec. 2; H. Sec. 3294; B. & C. Sec. 5121.)



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U.S. Supreme Court, D. C.
FILED.

JAN 6 1913

JAMES H. McKENNEY,
Clerk.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 122.

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

CITY OF PORTLAND, APPELLEE.

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.**

REPLY BRIEF FOR APPELLANT.

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"Section 6841. When it shall be necessary or convenient in the location of any road herein mentioned, to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road."

"Section 6842. Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 122.

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

CITY OF PORTLAND, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.

REPLY BRIEF FOR APPELLANT.

This is a suit to enjoin the City of Portland from enforcing ordinance No. 16491 of said city, enacted on the first day of May, 1907, making it "unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees or other person, firm, or corporation to run or operate steam locomotives or freight cars over, upon, or along Fourth street between Glisan street and the southerly limits of the city of Portland from and after eighteen months from the final passage or approval of this ordinance,

excepting freight cars for the reconstruction, repair, or maintenance of the railway lawfully and rightfully on said street."

The facts which form the basis of this suit are substantially as follows:

The Legislative Assembly of the State of Oregon on the 14th of October, 1862, passed an act entitled "An act providing for private incorporations and the appropriation of private property therefor" (Rec., pp. 295-305).

The sections of this act so far as applicable to this case are as follows:

"SECTION 4. The articles of incorporation shall specify:

"(1) The name assumed by the corporation and by which it shall be known, and *the duration of the corporation if limited.*

"(6) If the corporation is formed for the purpose of * * * making or constructing any railroad, * * * *the termini of such road.*

"SECTION 5. Upon the making and filing of the articles of incorporation as herein provided, the persons subscribing the same are corporators, and authorized to carry into effect the object specified in the articles, in the manner provided in this act; and they and their successors, associates and assigns by the name assumed in such articles shall thereafter be deemed a body corporate with power:

"(4) To purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation.

"SECTION 24. When it shall be necessary or convenient in the location of any road herein mentioned, to appropriate any part of any public road, street or alley, or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used, and oc-

cupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road.

"SECTION 25. Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section if the same be within the limits of any town, whether incorporated or not, *such corporation shall locate their road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto*" (Record, pp. 300, 301).

On the 23d day of November, 1866, the Oregon Central Railroad Company of Portland filed its articles of incorporation and was incorporated under the provisions of the aforesaid act of the legislature. The provisions of the said articles of incorporation so far as applicable to this case are as follows:

1st. "The corporation hereby created shall be known as the Oregon Central Railroad Company, and *its duration unlimited.*

2d. "The object and business of the corporation shall be to construct and operate a railroad from the city of Portland through the Willamette Valley to the southern boundary of the State; under the laws of Oregon, and law of Congress recently passed granting land and aid for such purpose.

3d. "The corporation shall have its principal office in the city of Portland.

6th. "The termini of the railroad proposed to be constructed by said company shall be for the northern end, at the city of Portland, and for the southern end at some point on or near the southern boundary of the State, as may be hereafter determined by actual survey (Record, p. 249).

This company commenced the construction of its railroad at the southern boundary of the city in April, 1868, and continued until the grading was completed and all bridges completed to the town of Hillsboro, Washington county. The company had entered into a contract with John H. Couch for ten blocks of land in the north end of the city as terminal grounds, and to reach these grounds it was necessary to select a route through the city. To that end the company applied to the city council to have it designate by ordinance in accordance with section 25, *supra*, Fourth street as the street upon which the company should locate its road (Record, pp. 42, 43).

Pursuant to this application of the company the city council of the city of Portland on the 6th day of January, 1869, passed ordinance No. 599, in words and figures as follows, to wit:

"An Ordinance Authorizing the Oregon Central Railroad Company, of Portland, to lay a railway track and run cars over the same, within the city of Portland.

"The City of Portland does ordain as follows:

"Franchise-Route.

"SECTION 1. The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and run cars over the same along the center of Fourth street, from the south boundary line of the city of Portland, to the north side of 'G' street, and as much farther north as said Fourth street may extend or be extended, upon the terms and conditions as hereinafter provided.

"Grade and Repairs.

"SECTION 2. The said railroad company shall grade to established grades, construct and maintain in good repair said street, at least six feet in width upon each side of the center line of said street, and

as much wider as may be affected by said railway or the construction thereof, and shall do and perform said work and the improvement and the repair thereof in such manner and as often as the common council of the city of Portland may at any time provide for or require.

"SECTION 3. The common council reserve the right to make or to alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary.

"SECTION 4. All alterations of grades or streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of the said railroad company, and the same shall be made as may be provided by ordinance.

"SECTION 5. It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the common council to declare by ordinance, the forfeiture of the same, and to cause the said rails to be removed from said street.

"Approved January 6th, 1869."

After the passage of said ordinance the company located its station or northern terminus on block seven at the then northern boundary of Portland, and began to extend its road southerly over Fourth street, putting in the improvements provided by said ordinance, and expended a large amount of money thereon. The grade on Fourth street was completed in 1870 or 1871 (Rec., pp. 44, 45, 46). The company first began to operate its trains over Fourth street in the year 1871.

On the 4th day of May, 1870, Congress passed an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon" (Rec., pp. 433-435).

Section 1 of this act of Congress is as follows:

"That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place, and also each alternate section of public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption of homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected up to the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency" (Rec., p. 434).

After the City of Portland designated Fourth street as the street upon which the company should locate its road, the company proceeded to construct its road from the northern terminus at or near the northern boundary of the city of Portland southerly along Fourth street, and thence southerly to St. Joseph, on the Yamhill river, near McMinnville, as

called for by the said act of Congress; and under the said grant from the legislature and under said act of Congress it operated its railroad over said line continuously from the year 1871, running passenger and freight trains thereon, with steam locomotives as a motive power, moving intrastate and interstate commerce thereon until the 6th day of October, 1880.

On March 16, 1870, the Oregon & California Railroad Company filed its articles of incorporation, and was incorporated under the laws of the State of Oregon, with its principal office for the transaction of business at Portland, Oregon, and on the 22d day of May, 1879, and the 5th day of July, 1883, it filed supplementary articles of incorporation (Rec., pp. 251-259). By the provisions of the original and supplementary articles of incorporation of the Oregon & California Railroad Company it was authorized and empowered, among other things, to purchase or lease or operate and maintain, on such terms as might be agreed upon, the railroad and telegraph lines, or any part thereof, of the Oregon Central Railroad Company as the same was then or might thereafter be constructed and extended.

On the 6th day of October, 1880, the Oregon Central Railroad Company transferred and conveyed to the Oregon & California Railroad Company, its successors and assigns, all of the railroad of the said Oregon Central Railroad Company theretofore constructed, including its rights acquired on Fourth street under said act of the legislature, as evidenced by ordinance No. 599. The Oregon and California Railroad Company, after taking over this railroad, continued to operate the same, and to run freight and passenger cars thereon by steam locomotive power from that date until the first day of July, 1887, when it assigned, transferred, and leased to the Southern Pacific Company, appellant, for the term of forty years from that date, its lines of railroads, including the line of the Oregon Central Railroad Company and the Oregon & California Railroad Company from its northerly

terminus at the intersection of Fourth street and North Front street, in the city of Portland, along Fourth street to Sheridan street, in said city, thence by way of Beavertown, Hillsboro, Forest Grove, and McMinnville to Corvallis, Oregon, together with all the rights and franchises theretofore granted to the Oregon Central Railroad Company under the laws of the State of Oregon, and as designated under said ordinance No. 599, and the Southern Pacific Company thereupon entered into the exclusive possession of said railroad and franchise and rights, and has ever since been and is now operating and maintaining the same, and running passenger and freight cars thereon moved by steam locomotives, as a common carrier for hire, and engaged in the transportation of interstate and intrastate commerce thereon. Up to the time of the passage of the ordinance complained of, the Oregon Central Railroad Company, its successors and assigns, fully complied with the terms and conditions of said grant and said ordinance No. 599, and had expended, upon the faith thereof, in the construction of said road on Fourth street and in improvements ordered and directed by the city of Portland, and in the renewal of said road from the north end of said Fourth street to the southerly boundary of said city, a sum in excess of \$133,000.

On the first day of May, 1907, the City of Portland, over the protest of the Oregon & California Railroad Company, as owner, and the Southern Pacific Company, as lessee, enacted ordinance No. 16491, which is as follows:

"An ordinance prohibiting the operation of steam locomotives and freight cars on Fourth street between Glisan street and the southerly limits of the city of Portland after eighteen months from the date of the passage of this ordinance, and providing a penalty for the violation thereof.

"The City of Portland does ordain as follows:

"SECTION 1. It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, or any other per-

son, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth street between Glisan street and the southerly limits of the city of Portland, from and after eighteen months from the final passage and approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.

"SECTION 2. Any violation of the provisions of this ordinance by the owners, officers, agents or employees of said Oregon Central Railroad Company, or its successors, assigns, or lessees or any other person, firm or corporation, by so running or operating steam locomotives or freight cars (other than those excepted in section 1 hereof), or attempting to run or operate the same on said Fourth street after the time mentioned in section 1 of this ordinance, shall be punishable by a fine of not less than \$250.00 nor more than \$500.00, or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotives or freight cars shall constitute a separate offense and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.

"SECTION 3. Said ordinance shall not be construed so as to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway or the use, operation, or running of any railway car or cars, motor or motors, locomotive or locomotives, or other railway vehicle or vehicles in, on, over, along or upon said Fourth street heretofore, now or hereafter claimed, alleged or set up by any person, persons, firm or corporation" (Rec., pp. 8, 9).

On the 16th day of November, 1908, the City of Portland, acting through its city attorney and chief of police, caused to be filed in the municipal court of said city a complaint charging in substance that the Southern Pacific Company

and James P. O'Brien, as general manager thereof, in the State of Oregon, on said day did violate the said ordinance No. 16491, in that the said corporation and the said James P. O'Brien, as such officer and manager, "did wilfully and unlawfully run and operate steam railway locomotives upon and along Fourth street between the south boundary line of said city and the south line of Glisan street in said city of Portland, and within the corporate limits of said city of Portland," etc. (Rec., pp. 9-10).

The bill of complaint alleges and it is admitted in the answer of the city that a warrant was issued upon said complaint for the arrest of James P. O'Brien as the general manager of the Southern Pacific Company, and that on said day he was arrested upon said warrant, and that the City of Portland, acting by and through its mayor and chief of police, threatened and intended to, and that it would unless restrained by order of court, enforce the said ordinance in the manner therein provided.

On the filing of the bill a restraining order was issued restraining the city from enforcing said ordinance pending the trial and determination of said cause. The city thereupon filed its answer and, after denying certain allegations of the bill and setting up certain affirmative matter, alleged, in substance, that ordinance "No. 16491 was enacted by the council of the city of Portland under and by virtue of the authority of and pursuant to the reserve powers in said ordinance No. 599, and in the proper and reasonable exercise of the police powers of the city of Portland for the protection of property and the lives, health, safety, and comfort of the citizens thereof and the public generally" (Rec., pp. 19-25), and the Southern Pacific Company having filed its replication to said answer, the cause was heard upon the pleadings and evidence taken in open court, and the court rendered a decision sustaining the validity of said ordinance on two grounds:

First. Upon the ground that it was within the powers reserved to the city in ordinance No. 599,

Second. That the passage of said ordinance was within the reasonable and necessary police power of the city.

The court thereupon dismissed the bill, but continued in force the restraining order pending the determination of this case upon this appeal.

The pleadings and record in this case are voluminous, but the issues involved may be brought within a narrow compass. The questions involved in this case are principally questions of law.

APPELLANT'S CONTENTIONS.

Appellant contends that:

I.

Sections 24 and 25 of the act of the Legislative Assembly of the State of Oregon, passed October 14, 1862, which are now secs. 6841 and 6842, Lord's Oregon Laws, granted to the Oregon Central Railroad of Portland, its successors and assigns, the right to appropriate so much of any public street of the city of Portland, Oregon, as might be necessary and convenient in the location and construction of its road, subject, however, to the right of the city under said act, in the first instance, to designate the particular street upon which the railroad company should locate its road.

II.

Under said Ordinance No. 599 the Common Council of the city of Portland designated Fourth street as the particular street within the city upon which said railroad company should locate its road.

III.

The grant by the State of this franchise or right to appropriate and use the part of the street so designated, when it was accepted and acted upon by the railroad company and valuable improvements made on the faith of said grant, became a contract between the State and the company which could not be impaired either by law of the State or by an ordinance of the city, and a vested property right which could be assigned, mortgaged or leased as other property, and as such was and is entitled to all the constitutional protection afforded other contracts and property rights.

IV.

The franchise thus granted was and is perpetual.

V.

A granting by the State of a franchise or right to a railroad company to appropriate and use a public street of a city is subject to the reasonable and necessary exercise of the police power of the State by appropriate action to protect the public health and the public safety, but any regulations adopted by virtue of the exercise of police power must be such only as are necessary to preserve the public welfare, and must be reasonable and must not be such as to defeat the purposes of the grant; and if regulations enacted for such purpose operate to impair a contract between the State and the company, or to deprive it of its franchise, or to deny it the equal protection of the laws, they are unconstitutional and void.

VI.

Ordinance No. 16491, the declared purpose of which is to prohibit "the operation of steam locomotives and freight cars on Fourth street," is not a reasonable or necessary exer-

cise of the police power of the State or city to regulate the use of the railroad on said street, with a view to the public welfare, but it is unreasonable and such as operates to defeat the purposes of the grant from the State and is void in that—

(a) It impairs the obligation of the contract under which the street was appropriated by the company and under which it located and operated its road thereon.

(b) It deprives the company of its property—said franchise—without due process of law and denies it the equal protection of the laws.

(c) Its enforcement will interfere with, restrain, and prevent the movement by the company of, interstate commerce.

APPELLEE'S CONTENTIONS.

Appellee contends that:

I.

On January 6, 1869, at the time ordinance No. 599 of the City of Portland was passed, it had no authority to grant a franchise to a railroad company or to appropriate any of the streets of the city, and that sections 24 and 25 of the act of the Legislative Assembly of the State of Oregon, passed October 14, 1862, which are now sections 6841 and 6842, Lord's Oregon Laws, is not a franchise, but a license, and that said ordinance is merely a license or permission to the Oregon Central Railroad Company to use Fourth street revocable at any time, and that therefore the said railroad company had no franchise or contract within the meaning of the Federal Constitution which could be impaired (Appellee's Brief, pp. 4, 80, 81, and 140).

II.

Section 3 of ordinance No. 599 reserved to the city the power to prohibit the running or operation of steam locomotives or freight cars over Fourth street (Appellee's Brief, p. 5).

III.

Under subdivision one of section 73 of an act of the legislature of the State of Oregon entitled "An act to incorporate the City of Portland, Multnomah County, State of Oregon, and to provide a charter therefor, and to repeal all acts and parts of acts in conflict therewith," passed January 23, 1903, providing that "the council has power and authority, subject to the provisions, limitations, and restrictions in this charter contained:

- "(1) To exercise within the limits of the City of Portland all the powers commonly known as the police power to the same extent as the State of Oregon has or could exercise said power within said limits,"

the city of Portland had the power to prohibit the running or operation of steam locomotives or freight cars over Fourth street (Appellee's Brief, pp. 10 and 141).

IV.

Whatever rights were given the company under the said act of the legislature of October 14, 1862, and the said ordinance No. 599 were not assignable (Appellee's Brief, p. 141).

ARGUMENT.

I.

The franchise or right granted the Oregon Central Railroad Company to appropriate and use the portion of Fourth street designated in ordinance No. 599 for the purpose of constructing and operating its railroad thereon is a grant direct from the State of Oregon and not from the city of Portland.

Appellant contends, the lower court held, and appellee concedes, that at the time of the passage of ordinance No. 599 the City of Portland had no authority given it to grant franchises for the construction or operation of railroads on its streets. It is provided by sections 6841 and 6842 of Lord's Oregon Laws that a corporation organized for the purpose of constructing a railroad may appropriate so much of any public street of a city or town as may be necessary or convenient in the location and construction of its road, subject, however, to the right of the city or town under said sections, in the first instance, to *designate* the particular street upon which the railroad company shall locate its road. But it is provided in section 6842 that "If such local authorities fail or refuse to make such *designation* within a reasonable time when requested, such corporation may make such appropriation without reference thereto." Some States have a constitutional or statutory requirement that no railroad shall be constructed within the limits of any city *without the consent of the local authorities*, and it has been repeatedly held that under such constitutional or statutory requirement the franchise or right to use the streets flows from the State and not from the municipality, and that this requirement is not a grant of authority to the municipality to create and grant franchises in the streets.

Dillon on Municipal Corporations, section 1228, 5th edition.

The court will note the difference between such constitutional or statutory requirement and the provisions of section 6842 of Lord's Oregon Laws. At the time ordinance No. 599 was passed and the Oregon Central Railroad Company appropriated, constructed, and operated its road on Fourth street there was no limitation on the right of a railroad company to appropriate a public street in a city or town in the State of Oregon save and except that contained in section 6842; and that was not a limitation affecting the grant from the State, but a mere right given to the city in the first instance to *designate* the particular street over which the railroad should be located. The language used in sections 6841 and 6842 constitutes a clear and definite grant of authority to railway companies to occupy and use the public streets of a town or city for railway purposes. It is a grant of the legislature to such company, not a grant of power to the city to grant such authority. When a corporation is organized for the purpose of constructing and operating a railroad the grant is in the nature of a floating grant until such time as the local authorities of the city or town designate the particular street over which the railroad shall be located, or until such time as the corporation shall appropriate the street in case the local authorities fail or refuse to make such designation. The moment the street is designated and accepted by the corporation the grant attaches as a present grant. The provision of section 6842 (*supra*) that "such corporations shall locate their road upon such particular street * * * within such town as the local authorities * * * having charge thereof shall designate" is not a grant of authority to the town or city to create and grant franchises in its streets; it is a mere authority given to the city in the first instance to designate the particular street to which the grant of the legislature attaches.

"When the legislature has regulated the terms and conditions upon which the streets of the municipality may be used by a railroad or other public-

service corporation, the city council or other officials charged with the duty of giving municipal consent to a construction of the public utility *cannot impose other or different conditions* which are inconsistent with those prescribed by the legislature."

Dillon on Municipal Corporations, fifth edition, section 1230.

This being the rule, when the construction of a railroad within the limits of a city is made dependent upon municipal consent, it certainly would apply with greater force under a provision of statute such as is contained in section 6842, where the power of the city is limited to the right to *designate* the particular street upon which the road shall be located and where a railroad company may appropriate so much of any street in a city as may be necessary and convenient in the location and construction of its road in the event that the local authorities refuse to make such designation. The only conditions the city was authorized to impose at the time of the passage of ordinance 599 were conditions in the nature of police regulations and not conditions affecting or limiting the grant from the State. Had the legislature of the State of Oregon, instead of limiting the power of the city to the right to designate the particular street over which a railroad should be located, as it did in section 6842, provided that a railroad company should not construct a railroad over the streets and highways of a city or town *without the consent* of the city, then, to use the language of Justice Lamar in the case of *Louisville vs. Cumberland Telephone Company*, 224 U. S., 649, such provision would have given the "municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept, in which event the franchise granted by the State would have been nugatory." But such power was not granted to the City of Portland directly or indirectly. It only had the power to *designate the partic-*

ular street over which the road should be located. It is submitted, therefore, that the city, not having been granted the power directly to impose or attach any condition by ordinance that would operate to defeat the grant of the State, could not, under the guise of the police power, adopt any regulation or impose any condition that would operate to defeat such grant. The city being powerless to withhold its consent to the use of its streets by such public-service corporation, and having no power to attach any condition which would operate to defeat the grant from the State, it will be presumed that the provisions of ordinance No. 599 were adopted with two purposes only in view, namely, *first*, to designate the particular street over which the Oregon Central Railroad Company should locate its road pursuant to the authority granted the city in section 6842 of Lord's Oregon Laws, and, *second*, the adoption of only such regulations by virtue of the exercise of the police power, as were necessary to preserve the public welfare, and not such regulations as would operate to defeat the purposes of the grant.

II.

The grant by the State of this franchise or right to appropriate and use the part of Fourth street so designated by ordinance No. 599, when it was accepted and acted upon by the railroad company and valuable improvements made and money expended on the faith thereof, became a contract **BETWEEN THE STATE AND THE COMPANY** which could not be impaired either by a law of the State or by an ordinance of the city.

In the case of *Mayor of Knoxville vs. Africa*, 77 Fed., 501, Lurton, circuit judge, speaking for the Circuit Court of Appeals, Sixth Circuit, said:

"A right of way upon a public street whether granted by act of the legislature, or ordinance of city council, or in any other valid mode, is an easement,

and as such is a property right capable of assignment, sale, and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts.

"A legislative grant of the right to use city streets for a public service upon condition of the performance of the service by the grantee when accepted and acted upon by the grantee is a contract between the grantee and the State, which is protected by the Constitution of the United States and which cannot be impaired by subsequent legislation."

Dillon on Municipal Corporations, 5th ed., section 1242.

III.

The franchise granted by the State of Oregon to the Oregon Central Railroad Company was one in perpetuity.

Section 4 of the act entitled "An act providing for private corporations and the appropriation of private property therefor" provides:

"SECTION 4. The articles of incorporation shall specify:

"1. The name assumed by the corporation and by which it shall be known and the *duration of the corporation if limited*" (Record, p. 296).

Paragraph 1 of the articles of incorporation of the Oregon Central Railroad provides:

"1st. The corporation hereby created shall be known as the Oregon Central Railroad Company, and *its duration unlimited.*"

In the case of *Louisville Trust Company vs. City of Cincinnati*, 76 Fed., 296, the Circuit Court of Appeals for the Sixth Circuit, speaking through Circuit Judge Lurton, said:

"The grant under the ordinance of December, 1871, was unlimited as to time. There was at that time no statutory restriction upon the power of a city

to grant an unlimited street easement to either a railroad or street car company, having the requisite franchises from the State. The act limiting the power of a city to a term not exceeding twenty-five years was not passed until May 14th, 1878. Neither do we think there was any implied restriction upon the power of the city springing from reasons of public policy. The corporation to which this grant was made was perpetual, and we see no sufficient reason which would justify the court in holding that it was not within the discretion of the municipal government to grant to such a company an unlimited easement upon the streets."

In the case of *Louisville vs. Cumberland Telephone Co.*, 224 U. S., 649, 662, Mr. Justice Lamar, speaking for the court, says:

"The plaintiff in error makes the further contention that its general demurrer should have been sustained and the bill dismissed because the original grant of street rights, having been indefinite as to time, was either void *ab initio*, or revocable at the will of the general council, or that it expired in 1893 when (Ky. Stat., 1909, sec. 2742) Louisville was made a city of the first class with new and enlarged power. In support of this proposition numerous decisions are cited, in some of which it appeared that a State had chartered a public utility corporation, but the city by ordinance had given an exclusive or perpetual grant of a street franchise which was held to be void because made in excess of the statutory power possessed by the municipality. In others the company had been incorporated for thirty years, and the street right was held to have been granted only for that limited period. In others it was decided that such privileges terminated with the corporate existence of the municipality through whose streets the rails and tracks were to be laid. *Detroit Citizens' St. Ry. vs. Detroit Railway*, 171 U. S., 48, 54; *St. Clair County Turnpike Co. vs. Illinois*, 96 U. S., 63; *Blair vs. Chicago*, 201 U. S., 400; 3 Dill. Mun. Corp., secs. 1265-1269.

"None of these decisions are applicable to a case like the present, where the Ohio Valley Telephone Company, with a perpetual charter, has received, not from the municipality, but from the State of Kentucky, the grant of an assignable right to use the streets of a city which remains the same legal entity, although by a later statute it has been put in the first class and given greater municipal powers. *Vilas vs. Manilla*, 220 U. S., 345, 361.

"In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at the will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

"This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without this essential right to use the streets."

IV.

This franchise, being a vested property right, can be assigned, mortgaged or leased as other property.

At the time the Oregon Central Railroad Company was incorporated, and at the time it dissolved, and on October 6, 1880, at the time it sold and transferred its property and this franchise to the Oregon & California Railroad Com-

pany, sections 6699 and 6701 of Lord's Oregon Laws were then in force, which are as follows:

*"SEC. 6699. All corporations that * * * are dissolved by virtue of the provisions of section 6701, * * * continue to exist as bodies corporate for a period of five years thereafter, if necessary, for the purpose of prosecuting or defending actions, suits or proceedings by or against them, settling their business, disposing of their property," etc.*

*"SEC. 6701. Any corporation organized under the provisions of this chapter may at any meeting of the stockholders which is called for such purpose, by vote of the majority of the stock of any such corporation, * * * authorize the dissolution of such corporation, and the settling of its business and disposing of its property and dividing its capital stock in any manner it may see proper."*

At the time the Oregon & California Railroad Company leased its property and this franchise to the Southern Pacific Company, section 6687, Lord's Oregon Laws, was in force, and is as follows:

"SEC. 6687. Upon making and filing the articles of incorporation as herein provided the persons subscribing the same are incorporators, and authorized to carry into effect the objects specified in the articles, in the manner provided in this chapter; and they and their successors, associates and assigns by the name assumed in said articles, shall thereafter be deemed a body corporate, with power,—

"7. In case the object or purpose for which any such corporation is incorporated is in whole or in part to construct, or construct and operate a railroad, to lease any part or all its road to any other company incorporated for the purpose of maintaining and operating a railroad, and to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company upon such terms and conditions as may be agreed upon between said companies respectively."

The object and purpose for which the Oregon & California Railroad Company was incorporated, as shown by its original and supplementary articles, was in part to construct and operate a railroad and to lease any part or all of its road to any other company incorporated for the purpose of maintaining and operating a railroad and to lease or purchase or maintain and operate any part of any other railroad constructed by any other company, and the Southern Pacific Company was authorized by its charter to enter into contracts with any corporation, company, or association in respect of the construction, establishment, acquisition, owning, equipment, leasing, maintenance, or operation of any railroads or telegraphs or steamship lines or any appurtenances thereof in any State or Territory of the United States. Manifestly, therefore, the Oregon Central Railroad Company was authorized to sell this franchise to the Oregon & California Railroad Company, and the Oregon & California was authorized to lease the same to the Southern Pacific Company and the Southern Pacific Company was authorized to accept a lease thereof.

The case of Oregon Railway & Navigation Company *vs.* Oregonian Railway Company, Ltd., 130 U. S., 1, relied upon by appellee in support of its contention that this franchise cannot be assigned or leased, is not in point for the reason that at the time the contract for the lease in that case was made there was no statute then in force in the State of Oregon authorizing the leasing of one railroad company to another of its entire property and franchises. The act of the legislature of the State of Oregon authorizing the leasing of such property by one railroad company to another was passed on February 17, 1887, and prior to the time the Oregon & California Railroad Company leased this property and this franchise to the Southern Pacific Company. There was ample statutory authority, therefore, for this lease. Aside from the authority expressly granted by the laws of the State of Oregon to a railroad corporation to sell

and dispose of its property and franchises and to lease the same, the City of Portland has ratified the assignment of this franchise and the lease thereof to the Southern Pacific Company, and it is estopped from claiming that such franchise was not assignable or could not be leased or that the Southern Pacific Company has no rights thereunder; it has from time to time since ordinance No. 599 was passed passed other ordinances expressly recognizing the rights of the Oregon & California Railroad Company as purchaser and those of the Southern Pacific Company as lessee of said franchise. It has passed ordinances requiring the Southern Pacific Company and its predecessors in interest to improve Fourth street, and has levied and collected from the Oregon and California Railroad Company taxes on said franchises amounting to large sums of money.

V.

Ordinance No. 16491 is not within any power reserved to the city by ordinance No. 599, nor is it a reasonable or necessary exercise of any police power of the State or city regulating the use of the railroad on Fourth street, with a view to the public welfare. It is unreasonable and oppressive.

The case of *Railroad Co. vs. Richmond*, 96 U. S., 521, is cited by appellee and relied upon as sustaining its position that the City of Portland, in the exercise of the powers reserved in ordinance No. 599, as well as in the exercise of its police power, had the right to prohibit the running or operation of steam locomotives or freight cars over Fourth street. The facts in that case are materially different and easily distinguishable from the facts in the case at bar. The facts in that case are stated in the opinion of the Court of Appeals of Virginia (67 Va., 83), and are as follows:

The Richmond, Fredericksburg & Potomac Railroad Company was incorporated February 25, 1834, by an act of the legislature of the State of Virginia—

"for the purpose of making a railroad from some point within the corporation of Richmond, to be approved by the common council, to some point within the corporation of Fredericksburg" (Charter, sec. 1),

And was authorized—

"to place on the railroad structure * * * all machines, wagons, vehicles, carriages and teams of every description whatsoever * * * necessary and proper for the purpose of transportation" (Charter, sec. 24).

On the 22d day of December, 1834, at a meeting of the president and directors of the Richmond, Fredericksburg & Potomac Railroad Company, the following preamble and resolutions were adopted:

"Whereas, by the act incorporating this company it is requisite that the point at which the railroad terminates, within the corporation of Richmond, should be approved by the common council, and it appears to the board most expedient to conduct the same from the Richmond turnpike along H street (now Broad street) to a point at or near the intersection of the said street and 8th street and for the present to terminate the same by suitable connections with the contemplated warehouses and workshops of the company on lots Nos. 477, 478, purchased by them from John Heth: Therefore,

"Be it resolved, That the approbation of the city council be requested to the above plan.

"Resolved, That the president cause a copy of the foregoing resolutions to be transmitted to the city council," etc.

In response to this resolution of the president and directors of the Richmond, Fredericksburg & Potomac Railroad Company, the city council of Richmond, on the 23d day of December, 1834, adopted the following preamble and resolutions:

"Whereas, by a resolution of the president and directors of the Richmond, Fredericksburg & Potomac Railroad Company submitted to the common council, it appears that it is deemed most expedient by the president and directors to conduct the said railroad from the Richmond turnpike along H street to a point at or near the intersection of said street and 8th street, and *for the present*, to terminate the same by suitable connections with the contemplated warehouses and workshops of the company on lots Nos. 477 and 478, purchased by them from John Heth:

"Resolved, That the common council do approve the proposed location of the said railroad and the *present* termination of the same, as prescribed in the foregoing resolution, and authorize the prosecution of the said work within the limits of the city on the above location: *Provided*, That in locating the said railroad no injury shall be done to the water-pipes now laid in and along said street; *Provided*, That the corporation of Richmond *shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad, and connecting the same with the depot of said company within the limits of the city.*"

On the 24th day of May, 1870, the legislature of the State of Virginia, by an act providing a charter for the city of Richmond, vested in the council of said city the power—

"to prevent the cumbering of streets, avenues, walks, public squares, lanes, alleys or bridges in any manner whatsoever;"

and the power—

"to determine and designate the route and grade of any railroad to be laid in said city and to restrain and regulate the rate of speed of locomotives, engines, and cars upon the railroad within said city, and * * * *exclude the said engines and cars, if they pleased, provided no contract be thereby violated.*"

On the 8th day of September, 1873, after the main line of the railroad had been changed to another route and negotiations for the sale of the depot property by the company to the city had failed, the city council passed an ordinance entitled, "An ordinance to amend the third section of an ordinance to regulate the use of Broad street by the Richmond, Fredericksburg & Potomac Railroad Company," which said ordinance was as follows:

"Be it ordained by the council of the city of Richmond that section 3 of an ordinance passed May 13, —, entitled, 'An ordinance regulating the use of Broad street by the Richmond, Fredericksburg & Potomac Railroad Company, be amended and re-ordained so as to read as follows:

"SEC. 3. That on and after the 1st day of January, 1874, no car, engine, carriage or other vehicle of any kind belonging to or used by the Richmond, Fredericksburg & Potomac Railroad Company, shall be drawn or propelled *by steam* upon that part of their railroad or railway track on Broad street east of Belvidere street in said city. The penalty for failing to comply with this section shall be a fine of not less than \$100 nor more than \$500 for each and every offense, to be recovered before the police justice of the city of Richmond."

The railroad company admitted that it violated this ordinance, but contended that the ordinance was invalid because it was in violation of its charter rights.

The Richmond, Fredericksburg & Potomac Railroad Company claimed that the provisions of sections 1 and 24 of its charter above quoted, and the subsequent resolutions passed by it, soliciting approval of the city council of Richmond of the point at which its railroad should terminate within the corporation of Richmond, and the resolutions of the council above quoted, created a perpetual contract between the State and the said company, by which, for all time and under all circumstances, it could run its cars propelled by steam on Broad street, in the city of Richmond.

It will be observed that the legislature of the State of Virginia, under the act incorporating the Richmond, Fredericksburg & Potomac Railroad Company, in express language reserved to the city of Richmond *the power to approve the point at which the railroad should terminate within the corporation of Richmond*. It will also be observed that the city council of Richmond, pursuant to this power granted it by the legislature, after approving the point at which the railroad should terminate within the city of Richmond, added the following proviso to said resolution:

"Provided further, That the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad, and connecting the same with the depot of said company within the limits of the city."

The railroad company adopted the corner of 8th and Broad streets as the terminal point of its road within the city of Richmond, being the point approved by the city council, with the express reservation,

"That the corporation of Richmond shall not be considered as parting with any power or chartered privilege not necessary to the railroad company for constructing the said road."

In the case of *Railroad Co. vs. Richmond*, 96 U. S., 521, the grant of the State to the railroad company to build its road "from some point within the corporation of Richmond" was conditional; it was subject to the approval of the common council of Richmond, and in the resolution of the common council it was expressly provided that the corporation of Richmond should not be considered as—

"parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad and connecting the same with the depot of said company within the limits of the city."

Thereby the city of Richmond reserved the right to exercise legislative and governmental powers over the road of the railroad company when constructed.

Here, the act of the legislature of the State of Oregon of October 14, 1862, did not reserve to the City of Portland any governmental or legislative powers over the road of the Oregon Central Railroad Company when constructed on Fourth street, but the legislature reserved to the City of Portland *power only in the first instance to designate the particular street over which said road should be constructed.*

The common council of the City of Portland, in the adoption of ordinance No. 599, was not exercising governmental or legislative powers, but instead it was exercising the only powers it had, viz., its business or proprietary powers. The purpose of the ordinance was not to govern the inhabitants of the city of Portland, but to obtain a private benefit for the city and for the inhabitants thereof.

It is claimed by the appellee, and the lower court held, that section 3 of ordinance No. 599, which is as follows:

"Sec. 3. The common council reserve the right to make or alter regulations at any time they deem proper for the conduct of the said road within the limits of the city, and the speed of railroad cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary,"

reserves to the city the power to prohibit the running and operation of steam locomotives or freight cars over, upon or along Fourth street.

Answering this contention, it is submitted that at the time ordinance No. 599 was passed the City of Portland had no power to grant a franchise to a railroad company to use its streets, nor to defeat in any manner a grant made by the State for such purpose. The only power the city had at that time, in relation to the use of the streets by a railroad, was a police power; if this be true, the only power the city could reserve in ordinance No. 599 was a power to adopt

such regulations as were not inconsistent with the grant of this franchise made by the State. The city had no power to attach conditions to the grant which would operate to defeat it.

We submit that a careful analysis of section 3 of ordinance No. 599 does not warrant the interpretation given it by the lower court or by the appellee. It provides that "the common council * * * may restrict or prohibit the *running* of locomotives *at such time and in such manner as they may deem necessary.*"

It is contended by the appellee, and was held by the lower court, that this clause of section 3 means that the common council might, at any time they deemed necessary, prohibit absolutely the running of steam locomotives over Fourth street. In other words, it is contended that the clause "*at such time and in such manner*" has the same import and meaning as the words "*at any time*" or "*at all times*" or "*absolutely.*" It is submitted that if the city council had intended to reserve the power to prohibit the running of steam locomotives "*at any time*" or "*at all times*" or "*absolutely,*" it would have used these words instead of the words "*at such time and in such manner.*"

There is certainly no reserved power at all in this ordinance No. 599 to prohibit the running or operation of freight cars over Fourth street. There is no express reservation to this effect, and no language is used from which such reservation can be implied. Besides, if it be held that the council reserved the power to prohibit the running of freight cars at any time they should deem necessary, this would be equivalent to holding that the council might do indirectly what they are not empowered to do directly, viz., to defeat the grant of the legislature. When the legislature of Oregon passed the act entitled "An act providing for private incorporations and the appropriation of private property therefor," on the 14th day of October, 1862, under which act this franchise was granted to the Oregon Central

Railroad Company, the legislature certainly had in mind that the purposes of the grant of the right of a railway company to appropriate a street in a city or town to locate and operate its railroad, contemplated something more than a mere right to lay its tracks on said street. A grant with such limited right would be senseless and without any benefit whatever to the grantee. The evident purpose of this act of the legislature was to grant to railroad corporations power not only to lay their tracks upon the streets of the city, but to operate by the motive power then in use passenger and freight cars thereon, as public-service corporations. The grant of the right to appropriate the street for the purpose of constructing a railway thereon, necessarily carried with it as a part of the grant the right to operate and run both passenger and freight cars thereon.

In the very nature of things, therefore, it could not have been the intention of the legislature, in passing this act, to clothe a town or city, or the local authorities thereof, with power, either directly or indirectly, to defeat the manifest spirit and intent of this grant. As before stated, the only power the city could have was a police power to regulate the use of the street by the railroad company in such manner as would not defeat the purposes of the grant.

Our contention is that the language "common council * * * may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary," means nothing more than that the common council might by ordinance prohibit the running of locomotives on said street at or between certain hours of the day or night, or that they might prohibit the running of locomotives without the ringing of a bell at cross streets, or without spark arresters, or under similar regulations tending to preserve the safety of the public.

It is also submitted that, for like reasons, the city did not, under its police power, have the right to prohibit the running or operation of steam locomotives or freight cars on Fourth street.

It is contended by appellee that the grant of the legislature to the Oregon Central Railroad Company to appropriate and use Fourth street for the purpose of constructing and operating a railroad thereon, is not a franchise, but a mere license, revocable at any time; that is to say, that the city had the power, immediately after the railroad had appropriated the street and had completed its railroad thereon at a large expenditure of money, to revoke its right to use this street to operate its railroad, either directly or indirectly under the guise of the exercise of police power, by prohibiting the railroad from using steam locomotives or running freight cars over the street. Such contention is wholly at variance with the decisions, as well as with the spirit and intent of the act of the legislature conferring upon a railroad company the right to appropriate a street for railroad purposes. In the year 1862, at the time when the act of the legislature conferring this franchise was passed, the motive power then generally used for operating and running railway cars, both passenger and freight, was steam. Manifestly, the legislature, at the time of the passage of this act giving railway companies the right to appropriate such portion of a public street of a city or town as might be necessary to construct and operate its road, contemplated that such road, when constructed, should be operated by the motive power then generally used, and that the railroad would run both freight and passenger cars thereon.

It is contended that inasmuch as neither the act of the legislature nor ordinance No. 599 authorizes in express terms the use of steam locomotives as a motive power for operating a railroad, therefore the city has the power to prohibit the operation and running of steam locomotives on Fourth street and to compel the operation thereof by electricity.

Answering this contention, it is sufficient to say that at the time this act of the legislature was passed, as well as at the time ordinance No. 599 was adopted, electricity was not

used as a motive power at all in operating railroads, and certainly it cannot be contended with any degree of seriousness that at that remote time the legislature of the State of Oregon contemplated that both street and commercial railways should be operated by electricity. The Chicago Electric Railway, which opened at the Chicago Railway Exposition in 1883, was the first constructed in this country for business purposes.

It may readily be conceded that the city, under its police power, had the right by ordinance to regulate the time and the manner in which freight cars should be run over Fourth street—that is to say, it might provide that freight cars should be moved only during the night time, or during certain hours of the day or night; all this with a view to public safety. But when the contention is broadly made that the city, at any time after the completion of the road on Fourth street, and after its completion and operation to St. Joe on the Yamhill River, might arbitrarily prohibit the running of freight cars on Fourth street, it not only runs counter to the spirit and intent of the act of the legislature under this grant, but is directly in conflict with the act of Congress of May 4, 1870. The title of this act is, "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," section 1 of which provides:

"That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands, of the width of 100 feet on each side of said road," etc.

This act of Congress, which evidently contemplated that this railroad when constructed would move intrastate and

interstate commerce by the operation of freight cars on said road, would be rendered absolutely nugatory if the City of Portland could, at any time after the completion of its road on Fourth street, prohibit the running of freight cars thereon. It will be remembered that the northern terminus of this road, as shown by the evidence, was at or near the northern boundary of the City of Portland, where the terminal grounds now are. The termini of this road was so designated pursuant to the provisions of section 4, subdivision 6, of the act of the legislature providing for private incorporations and the appropriation of private property therefor, which provides that if the corporation is formed for the purpose of the construction of any railroad, the articles of incorporation shall specify the termini of such road. The railroad company, having designated the termini of its road as the terminal grounds at the northerly boundary of the City of Portland, and at some point in the southerly part of the State, and Congress having passed this act to aid in the construction of said road between said termini, and having granted certain sections of the public lands in consideration of the operation of said road as a public service corporation between said termini, it is submitted that the railroad company was compelled to operate its road between these points and to move intrastate and interstate commerce over the same, or else to forfeit its rights under said act of Congress.

If the appropriation and use of Fourth street by the railroad company for the purpose of constructing and operating its road thereon was a mere license, revocable at any time, then the city had authority to revoke this right immediately after the road was completed from the terminal grounds in the northern end of Portland to St. Joe on the Yamhill River, the place designated under said act of Congress, and thereby defeat the purposes of the grant on the part of the State, as well as the grant made by Congress in aid of the construction of this railroad. As before stated, at that time the city did not have the power to grant this right—whether it be called a franchise or a license—but the

grant (whatever it may be termed) flowed directly from the State. Neither did the city have the power to attach any conditions that would operate to defeat this grant, or to adopt any regulations, under the guise of the exercise of police power, that would have the same effect.

Our contention is that ordinance 16491 impairs the obligation of the contract under which the street was appropriated by the railroad company and under which it located and operated its road, and that it deprives appellant of its franchise and property without due process of law, in that its enforcement empowers the city arbitrarily to take appellant's property without just, or any, compensation, and without its consent, in violation of section 18 of article I of the constitution of the State of Oregon, which provides that private property shall not be taken for public use without just compensation." It is conceded that compensation is not a condition to the adoption of regulations under the police power to protect the lives and secure the safety of the people, but such regulations must be reasonable. When they amount to a denial of the equal protection of the laws or operate to deprive a corporation of property without due process of law, they are unconstitutional and void.

And said ordinance deprives the appellant of its property without due process of law, in that it deprives it of the beneficial use of its franchises by means of the imposition of fines, imprisonment and forfeitures, and undertakes to enforce against appellant by such means a compliance with the contract between the State and the appellant, as attempted to be modified, and as construed by the city, and in that the city council, by said ordinance, have undertaken arbitrarily and conclusively to determine private rights, by the enactment of an ordinance purporting to decide and adjudicate questions of a judicial nature affecting private contract and property rights without a regular course of legal proceedings, or before a competent tribunal, and without the observance of any of those rules which our system of jurisprudence prescribes for the security of private rights.

Our contention is that this franchise, when it was accepted and acted upon by the railroad company, became a contract between the State and the railroad company; that if any power was reserved to modify this contract, it was a power reserved in the State and not in the city; that if the contract has been violated by the appellant and its predecessors, by either failing to conform to some condition which the State or city had power to impose, or by failing to observe some reasonable or necessary regulation, the State only, or the city upon the relation of the State, can enforce a compliance with said contract, or declare a forfeiture thereof, and this only in a tribunal having jurisdiction to determine contract and property rights; that in the enforcement of this contract, if violated, the city should be required to exercise its proprietary or contractual rights, and should not be permitted to exercise its legislative or governmental powers.

The ordinance complained of not only provides that the city may arbitrarily enforce a compliance with the terms of the contract as modified and interpreted by the city, but it prescribes penalties different and in excess of those authorized by the charter for the enforcement of its ordinances.

Section 73 of article IV of the charter of the City of Portland, approved January 23, 1903, which was in force at the time of the passage of ordinance No. 16491, provides that—

“The common council has power and authority, subject to the provisions, limitations and restrictions in this charter contained—

“To provide for punishment for a violation of any ordinance by fine or imprisonment, *not exceeding* \$500 fine or six months’ imprisonment, or both, or by forfeiture and penalty.”

Whereas ordinance No. 16491 makes the following provision for the punishment of a violation thereof:

“Sec. 2. Any violation of the provisions of this ordinance by the owners, officers, agents or employees, of said Oregon Central Railroad Company, its suc-

cessors, assigns or lessees, or any other person, firm or corporation, by so running or operating steam locomotives or freight cars (other than those excepted by section 1 thereof), or attempting to run or operate the same on said Fourth street after the time mentioned in section 1 of this ordinance, shall be punishable by a fine of not less than \$250 nor more than \$500 or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day's running or operating, or attempting to run or operate such locomotive or freight cars, shall constitute a separate offense, and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street."

It will be observed that the charter provides for a punishment for a violation of any ordinance by a fine not exceeding \$500; whereas this ordinance imposes a penalty for a violation thereof by a fine of not less than \$250 nor more than \$500, and in addition to this penalty it imposes the further penalty of a forfeiture of all the rights and privileges claimed by the Oregon Central Railroad Company, its successors, assigns or lessees. It cannot be claimed that this ordinance is void only as to the fine sought to be imposed and valid as to the other punishment, because if the fine is eliminated, then the ordinance necessarily imposes a greater penalty than allowed by the charter, for the reason that the municipal court would have no alternative except to impose a fine and declare the forfeiture, if it had power to declare a forfeiture, which is denied.

This ordinance not only arbitrarily deprives appellant of the beneficial use of this franchise under the contract with the State, without any regular course of judicial procedure to settle its contract rights, but it goes further and seeks, by the imposition of penalties wholly unauthorized by the charter, to harass and annoy the appellant in the

use of its property, and this, too, under the guise of exercise of police power.

In conclusion, it is submitted that for all the reasons stated this ordinance is invalid, and that the decision of the lower court should be reversed.

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IN THE
Supreme Court
OF THE
UNITED STATES

October Term, 1911

No. 212

SOUTHERN PACIFIC COMPANY

Appellant

VS.

THE CITY OF PORTLAND

Respondent

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF FACTS

In January, 1869, the City of Portland, by ordinance No. 599, authorized and permitted the Oregon Central Railroad Company to lay a railway track and run its cars over the same, along the center of Fourth Street, from the southerly boundary line of the City of Portland to the north side of "G" Street (now Glisan Street) in said City. Section 3 of said ordinance, provided that

the Common Council reserved the right to make, or alter regulations at any time it might deem proper for the conduct of the said road, within the limits of the City, and might restrict, or prohibit the running of locomotives, at such time, and in such manner, as it might deem necessary. In Section 5 of said ordinance it was expressly provided that any refusal, or neglect of the said Oregon Central Railroad Company to comply with the requirements of said ordinance, or any other ordinance, enacted in pursuance thereof, should be deemed a forfeiture of the rights and privileges therein granted, and that it would be lawful for the Council to declare by ordinance the forfeiture of the same, and to cause the rails to be removed from the street. The Oregon Central Railroad Company accepted said ordinance, and the plaintiff in error is the successor in interest of said company.

On the first day of May, 1907, the City of Portland enacted Ordinance No. 16491 which prohibited the said Oregon Central Railroad Company, or its successor, the plaintiff in error, from operating steam locomotives, or freight cars on said Fourth Street, from and after 18 months from the final passage or approval of said ordinance. At the expiration of said period, the plaintiff in error continued to use steam locomotives on Fourth Street, and the general manager of the plaintiff in error was arrested for a violation of said ordinance. A suit was then begun in the Circuit Court of the United States for the District of Oregon, to enjoin the City of Portland from enforcing said ordinance, and in the due course of time said case was heard and determined by that court. It is contended by the plaintiff in error that

ordinance No. 16491 is void because it impairs the obligation of a contract (the franchise under which the road was located), and interferes with vested rights of property; that it deprives the plaintiff in error of its property without due process of law; that it deprives it of the equal protection of the laws, and that it is an unlawful interference with interstate commerce.

It is contended on behalf of the defendant in error that at the time of the enactment of Ordinance No. 599, the general laws of the State of Oregon (Secs. 6841 and 6842 L. O. L.) provided that whenever it should be necessary and convenient in the location of any railroad to appropriate any part of any public road, street or alley, or public grounds, the corporation constructing the road, if within the corporate limits of the municipality, was authorized to agree upon the extent, terms and provisions upon which the same might be appropriated or used, and that this section gave the city of Portland power to designate the street upon which the predecessor in interest of the plaintiff in error to locate its road. This carried with it the power to impose reasonable conditions to such grant or permission, which, when accepted by the grantee, became binding upon it, and that said ordinance No. 599 specifically reserved unto the city the right to regulate the use of the street for railway purposes, and, if necessary, to exclude therefrom steam locomotives and freight cars whenever in the judgment of the council such legislation was necessary or advisable.

It is further contended by the defendant in error that Ordinance No. 16491 does not attempt to destroy or im-

pair any vested rights. Defendant's only purpose is to regulate the use of the street. It is further contended that the enactment of Ordinance No. 599, irrespective of the reserved power in the ordinance, did not deprive the city of its police powers nor of the right to exercise this power; that the authority reserved is broad and general in its terms and is not susceptible of any technical construction; that it was intended merely to reserve the power to regulate or even prohibit the use of steam locomotives. The plain intent was to reserve the right to make all needful rules and regulations governing the operation of the railroad as the growth of the city and changing conditions might justify, even to the extent of prohibiting the use of steam locomotives or freight cars whenever in the judgment of the council this should become necessary.

It is further contended by the defendant in error that the rapid growth of this western city has necessitated such legislation. It was also contended in the lower court by the defendant in error that Ordinance No. 599 is not a franchise for the reason that at the time of the enactment thereof the city had no authority to grant franchises as that term is now understood; that said ordinance is merely a license or permission on the part of the council to the grantee named therein to use the street, revocable at any time, and therefore the Oregon and California Railroad Company, the predecessor in interest of the plaintiff in error, not having any franchise on the street, the enactment of Ordinance No. 16491 did not impair or destroy any contract rights within the meaning of the Federal Constitution. And it was further contended that the grant was personal to the grantee

and that it had no power or authority to transfer the license or permission to the Southern Pacific Company, the plaintiff in error, without the consent of the City, and therefore so far as the plaintiff in error is concerned, it having no vested right on the street, the enactment of Ordinance No. 16491 did not impair or destroy any rights.

The lower court entered a decree adjudging said Ordinance No. 16491 to be a valid exercise of the city's power under the provisions of Ordinance No. 599, and also declared that its provisions were not unreasonable or arbitrary, since it was within the legitimate police power of the municipality, and ordered that the bill of complaint be dismissed. However, the Court entered an order restraining the defendant in error from enforcing said decree until this suit could be finally determined by this Honorable Court.

POINTS AND AUTHORITIES

1. The ordinance, authorizing the plaintiff in error to use Fourth Street and reserving to the city the right to make and alter regulations governing the conduct of the road within the limits of the city, to regulate the speed of cars and locomotives within such limits and to restrict the running of locomotives at such time and in such manner as might be deemed necessary, reserves to the city the right to make such rules and regulations, even to the extent of prohibiting the use of steam locomotives or freight cars on Fourth Street.

Railroad Co. v. Richmond, 96 U. S. 521;

Buffalo & Niagara Falls Ry. Co. v. City of Buffalo, 5 Hill (N. Y.) 209;

McQuillan on Ordinances (2d Ed.) Sec. 763;
 Nellis on St. Railways, Sec. 46;
 Pacific Railroad Co. v. Leavenworth, Fed. Case
 No. 10649 (1 Dillon 393);
 Pac. etc. Ry. v. Hood, 94 Fed. 618;
 Railroad v. Bingham, 87 Tenn. 522;
 Louisville T. Co. v. City, 47 U. S. App. 36; 22
 C. C. A. 534; 76 Fed. 296; 78 Fed. 307;
 Dillon on Municipal Corporations (5th Ed.)
 Vol. III, §1229, p. 1952; and cases cited un-
 der note to text;
 Clinton v. Worcester, 199 Mass. 279;
 Rutherford v. Hudson R. T. Co., 73 N. J. L. 227;
 McQuaid v. Portland Ry. Co., 18 Ore. 248;
 Article II, §4, Const. Ore.

2. The power reserved in Ordinance No. 599 to regulate the operation of locomotives on Fourth Street, if involved or doubtful, should be construed in favor of the city against the grantee.

O. R. N. Co. v. Oregonian Ry., 130 U. S. 1, 9
 Sup. Ct. 409, 32 L. Ed. 837;

Freeport Water Co. v. Freeport City, 180 U.
 S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679;

Burns v. Multnomah Ry. Co. (C. C.) 15 Fed.
 177.

3. Ordinance No. 599 was necessarily made and accepted subject to the city's right to the exercise of its police power. The power to make such regulations concerning the operation of the plaintiff's road as public safety and welfare might, from time to time, require, as that power cannot be contracted away.

- N. P. v. Duluth, 208 U. S. 583;
 Joyce on Franchises, Sec. 138;
 Ex parte Koehler, 23 Fed. 529;
 P. Ry. L. & P. Co. v. Railroad Commission, 105
 Pac. (Ore.) 713;
 Constitution Ore. Article II, §2;
 Charter City of Portland, Abstract of Record,
 p. 443;
 Fertilizing Co. v. Hyde Park, 97 U. S. 663.
 North Chicago, etc. v. Lakeview, 105 Ill. 207;
 Buffalo & Niagara Falls Ry. Co. v. City of
 Buffalo, 5 Hill (N. Y.) 209;
 Brown v. City, 47 Pa. St. 329;
 Elliott on Roads and Streets (3d Ed.) Vol. II,
 §839;
 Municipal Paving Co. v. Donovan, 142 S. W.
 644;
 Macomb v. Jones, 158 Ill. App. 271;
 Hennington v. Georgia, 163 U. S. 299;
 Baltimore v. Baltimore T. Co., 166 U. S. 673;
 Portland Ry. L. & P. Co. v. Portland, Fed. (De-
 cided Nov. 1912, not reported);
 Beer v. Mass., 97 U. S. 25;
 Mugler v. Kansas, 123 U. S. 623;
 N. Y. & N. E. R. R. v. Bristol, 151 U. S. 567,
 14 Sup. Ct. 437, 38 L. Ed. 269;
 New Orleans Gas Co. v. Louisiana Light Co.,
 115 U. S. 60.
 Budd v. New York, 143 U. S. 517;
 Chicago, Burlington & Quincy Railroad v. Chi-
 cago, 166 U. S. 226;

- Detroit Railroad Co. v. Osborne, 189 U. S. 383;
 New Orleans Gas Light Co. v. Drainage Commissioners of New Orleans, 197 U. S. 453;
 Chicago, Burlington & Quincy Railroad Co. v. People of the State of Illinois, ex rel Drainage Commissioners, 200 U. S. 561;
 Union Bridge Co. v. United States, 204 U. S. 364;
 Cooley on Const. Lim. (7th Ed.) p. 400;
 9 Enc. of U. S. Sup. Ct. Reports, 494;
 Stone v. Miss., 101 U. S. 814, 817;
 Butcher's Union v. Crescent City Co., III. U. S. 748;
 Slaughter House Cases, 16 Wall. 36, 62;
 Boyd v. Ala., 94 U. S. 645;
 Douglas v. Kentucky, 168 U. S. 488;
 Railway Co. v. People, 201 U. S. 506;
 City of Portland v. Cook, 48 Ore. 550, 555;
 Portland v. Meyer, 32 Ore. 368, 371;
 State v. Muller, 48 Ore. 252, 255; (208 U. S. 412);
 State v. Muller, 208 U. S. 412;
 St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1;
 Providence Bank v. Billings, 4 Pet. 514;
 Railroad Comm. Cases, 116 U. S. 307, 325; 29 L. Ed. 636, 642; 6 Sup. Ct. Rep. 344, 388, 1191;
 Vicksburg S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. Ed. 770; 6 Sup. Ct. Rep. 625;
 Freeport Water Co. v. Freeport, 180 U. S. 587,

588, 611; 45 L. Ed. 679, 693; 21 Sup. Ct. Rep. 493;

Stanislaus Co. v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201; 48 L. Ed. 306, 412; 24 Sup. Ct. Rep. 241;

New York ex rel Metropolitan Street R. Co. v. New York State Tax Commrs., 199 U. S. 1; 50 L. Ed. 65; 25 Sup. Ct. Rep. 705;

Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385; 52 L. Ed. 257; 28 Sup. Ct. Rep. 135;

Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 273.

4. Ordinance No. 16491, prohibiting the use of steam locomotives on Fourth Street, does not deny the plaintiff in error the equal protection of the laws, although it alone is named in the ordinance, where no other person or corporation has the right to run engines in that street, as is the case at bar.

Richmond F. & P. R. Co. v. Richmond, 96 U. S. 521.

5. The appropriate regulation of the use of property is not "taking it," within the meaning of the constitutional prohibition against the deprivation of property without due process of law.

Richmond F. & P. R. Co. v. Richmond, 96 U. S. 521.

Pittsburg, C. & St. L. R. Co. v. Hood, 36 C. C. A. 428, 94 Fed. 624.

6. The ordinance complained of, prohibiting the use of steam locomotives on Fourth Street, does not impair

any vested rights of the plaintiff in error under its charter.

Richmond F. & P. R. Co. v. Richmond, 96 U. S. 521.

7. The charter of the City of Portland in force when Ordinance No. 16491 was passed contains the following provision: "The council has power and authority, subject to the provisions, limitations and restrictions in this charter contained: (1) To exercise within the limits of the City of Portland all the powers commonly known as the police power to the same extent as the State of Oregon has or could exercise said power within said limits." (Charter, City of Portland, Sec. 73; Laws of Oregon, 1903, p. 24.) Under this power the council has authority to regulate the running of railroad cars within the city limits and to prohibit their propulsion by steam.

Richmond F. & P. R. Co. v. Richmond, 96 U. S. 521;

Buffalo & N. F. R. Co. v. Buffalo, 5 Hill (N. Y.) 209;

Dillon on Municipal Corporations (5th Ed.), Sec. 65.

8. The rule is generally recognized that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances.

McQuillin on Municipal Ordinances (2d Ed.), Sec. 731, p. 1586;

47 Alabama, Greensboro v. Ehrenreich, 80 Ala. 579; 60 Am. Rep. 130; Van Hook v. Selma, 70 Ala. 361; 45 Am. Rep. 85;

- California: *Ex parte Delaney*, 43 Cal. 478; *Ex parte Smith*, 38 Cal. 702;
- Kentucky: *Louisville v. Roupe*, 6 B. Mon. (Ky.) 591;
- Maryland: *Spriggs v. Garrett Park*, 89 Md. 406;
- Massachusetts: *Commonwealth v. Patch*, 97 Mass. 221;
- Missouri: *Lamar v. Weidman*, 57 Mo. App. 507;
Hanibal v. M. & K. Tel. Co. 31 Mo. App. 23;
- New Jersey: *Budd v. Camden*, 69 N. J. L. 193, 54 Atl. 569;
- Union Oil Co. v. Portland, 198 Fed. 441;
- Dobbins v. Los Angeles, 195 U. S. 223.

9. The legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence.

- McQuillan on Municipal Ordinances (2 Ed.)
 Sec. 731, p. 1587;
- Union Oil Co. v. Portland, 198 Fed. 441.

10. In determining the question, the court will have to regard all the circumstances of the particular city or corporation, the object sought to be obtained, and the necessity which exists for the ordinance.

- McQuillan on Municipal Ordinances (2 Ed.)
 Sec. 732, p. 1588.

11. When a privilege or a franchise is granted containing the reserved power to alter, amend or repeal, whenever the public interest may require, no question

as to the impairment of the obligation of the contract can arise when additional burdens are imposed.

N. P. v. Duluth, 208 U. S. 583;

Sioux City Street Ry. Co. v. Sioux City, 138 U. S. 98;

Nellis on Street Railways, Vol. 1, §46.

12. A municipal corporation has no power to grant a franchise in perpetuity without express statutory authority from the legislature.

City of Joseph v. Joseph Water Co., 57 Or. 586;
Boise City Artesian Water Co. v. Boise City,
123 Fed. 232;

Boise City Artesian Water Co. v. Boise, 186
Fed. 705;

Logansport Railway Co. v. City, 114 Fed. 688;
Citizens St. Ry. v. Detroit, 171 U. S. 48;

Nellis on Street Railways §46.

Elliott on Roads & Streets, Vol. II, §1048, (and
cases cited in note);

Lake Rowland v. Baltimore, ⁷⁷~~97~~ Md. 352;

City of Bellville v. Citizens R. Co., 152 Ill. 171;

McQuaid v. Portland Ry. Co., 18 Ore. 237;

Cedar Rapids Water Co. v. Cedar Rapids, 118
Iowa 234;

28 Cyc. 655, 875;

Cooley's Constitutional Limitations (6th Ed.)
251;

Brenham v. Water Co., 67 Tex. 542;

*Ill. Trust & Savings Bank v. Arkansas City
Water Co.* (C. C. 76 Fed. 196;

Birmingham & Pratt Mines St. Ry. Co. v. Birmingham, 79 Ala. 472 (58 Am. Rep. 615).

Huron Water Works Co. v. City of Huron, (S. D.) 12 Am. R. R. & Corp. Rep. 398.

Westminster Water Co. v. Westminster (Md.), 64 L. R. A. 630, 98 Md. 551.

A contract beyond the power of the city is void ab initio.

State v. Minnesota Ry. Co., 80 Minn. 108, 50 L. R. A. 656;

Flynn v. Little Falls Elec. Co., 74 Minn. 180.

The city was vested with the right and power at the time Ordinance No. 599 was passed to designate the street upon which the railroad could locate its road, and this right carried with it the power to impose reasonable conditions to such grant or permission which, when accepted by the grantee became binding on it.

Pittsburg C. & St. L. Ry. Co. v. Hood, 94 Fed. 618;

Southern Bell Tel. & Tel. Co. v. City of Mobile, 162 Fed. 523;

Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 Fed. 347;

Pacific Ry. Co. v. Leavenworth, Fed. Case No. 10649 (1 Dillon 393);

Michigan Tel. Co. v. City, 93 Fed. 11;

Pittsburg C. & St. L. Ry. Co. v. Hood, 94 Fed. 618.

13. Prohibition of steam power, under Ordinance No.

16491 does not prevent employment of electricity as a motive power.

Booth on St. Railways, §68 (2d Ed.).

14. Ordinance No. 16491 does not constitute an interference with interstate commerce.

Smith v. Ala., 121 U. S. 465.

15. The rule is generally recognized that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances, subject to the supervision of the courts.

McQuillan on Ordinances (2d Ed.) Vol. II, §§731, 732;

Union Oil Co. v. Portland, 198 Fed. 441;

Holden v. Hardy, 169 U. S. 366;

Dobbins v. Los Angeles, 195 U. S. 223.

16. Evidence in case at bar found by court below to justify enactment of Ordinance No. 16491.

Opinion of Court, Abstract of Record, page 31.

17. Any doubt or ambiguity in Ordinances No. 599 and No. 16491 must be resolved against appellant.

19 Cyc. 1459;

O. R. & N. Co. v. Ore. Ry. Co., 130 U. S. 1, 26;

Mayor v. Farmers L. & T. Co., 143 Fed. 67, 71;

City v. Helena W. Wks., 122 Fed. 1, 14;

Oregon v. P. Gen. Elec. Co., 52 Ore. 343;

Joseph v. Joseph Water Co., 57 Ore. 586.

18. A right granted in the nature of a franchise, to be exercised for a public purpose, cannot be assigned or leased without legislative authority.

Oregon v. P. G. E. Co., 52 Ore. 521;

Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1.

ARGUMENT.

On May 1, 1907, the Council of the City of Portland enacted Ordinance No. 16491, which reads as follows:

“Section 1: It shall be unlawful for the Oregon Central Railroad Company of Portland, Oregon, its successors, assigns, or their lessees, or other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after eighteen months from the final passage or approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.

“Section 2: Any violation of the provisions of this ordinance by the owners, officers, agents or employees of said Oregon Central Railroad Company, or its successors, assigns or lessees, or any other person, firm or corporation, by so running or operating steam locomotives or freight cars (other than those excepted in Section One hereof), or attempting to run or operate the same on said Fourth Street after the time mentioned in Section One of this ordinance, shall be punishable by a fine of not less than \$250.00 nor more than \$500.00, or by imprisonment for not more than six months, or by both

such fine and imprisonment, and each day's running or operating, or attempting to run or operate such steam locomotive or freight cars shall constitute a separate offense, and such violation shall be deemed a forfeiture of any and all rights and privileges claimed by said Oregon Central Railroad Company with respect to the operation of any railway on said street.

"Section 3: This ordinance shall not be construed so as to recognize, assent to, affirm, confirm, ratify or extend any right, franchise or privilege relative to the maintenance or operation of any railway or the use, operation or running of any railway car or cars, motor or motors, locomotive or locomotives or other railway vehicle or vehicles in, on, over, along or upon said Fourth Street heretofore, now or hereafter claimed, alleged or set up by any person, persons, firm or corporation."

On December 30, 1868, the Council of the City of Portland enacted Ordinance No. 599, which reads as follows:

"Section 1: The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland to the north side of G Street, and as much farther north as said Fourth Street may extend or be extended, upon the terms and conditions as hereinafter provided.

"Section 2: The said railroad company shall grade to established grades, construct, and maintain in good repair said street, at least six (6) feet in width upon each side of the center line of said street, and as much wider as may be affected by

said railway or the construction thereof, and shall do and perform said work and the improvement and repair thereof in such manner and as often as the Common Council of the City of Portland may at any time provide for or require.

"Section 3: The Common Council reserve the right to make or to alter regulations at any time, as they deem proper, for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary.

"Section 4: All alterations of grades or streets required for laying said railroad track, and all improvements and repairs of the same for said purpose, shall be made at the expense of the said railway company, and the same shall be made as may be provided by ordinance.

"Section 5: It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance the forfeiture of the same, and to cause the said rails to be removed from said street."

The general laws of Oregon in force at that time read as follows:

"Section 6841. When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road,

street, or alley, or public grounds, the county court of the county wherein such road; street, alley, or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms, and conditions upon which the same may be appropriated or used, and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road. (L. 1862; D. p. 666, §26; H. §3242; B. & C. §5077.)"

"Section 6842. Whenever a private corporation is authorized to appropriate any public highway or grounds as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley, or public grounds within such town as the local authorities mentioned in the last section and having charge thereof shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time when requested, such corporation may make such appropriation without reference thereto."

The Circuit Court, through Judge Robert S. Bean, was of the opinion that Ordinance No. 16491 was valid; that the Council has the authority under the reservation made in Section 3 of Ordinance No. 599 to enact it and whether the reservation was made, or not, or whether the plaintiff in error was occupying the street under a franchise, or mere permission, yet, the City had the right under the police power, to enact said ordinance.

The opinion of the lower Court is as follows:

"This is a suit to enjoin the City of Portland from enforcing Ordinance No. 16491, adopted in May, 1907, making it unlawful for the Oregon Central Railroad Company, 'its successors, assigns or their lessees, or any other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth Street between Glisan Street and the southerly limits of the City of Portland, from and after 18 months from the final passage or approval of this Ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street.' The plaintiff is occupying and using the street in question for railway purposes, as the assignee, lessee or successor in interest of the Oregon Central Railroad Company which, by ordinance No. 599, approved January 6, 1869, was 'authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland to the north side of "G" (now Glisan) Street, and as much farther north as said Fourth Street may extend or be extended upon the terms and conditions' as therein provided.

"By Section 3 of the Ordinance 'The Common Council reserve the right to make or alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives (within said limits) and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary.' The terms and conditions of the Ordinance were accepted by the grantee and it proceeded to construct its road along the street and such road has ever since been used and operated by it and its successors in inter-

est for railway purposes, and numerous freight and passenger trains propelled by steam locomotives now pass over the road daily.

“At the time of the passage of Ordinance No. 599, the City had no express authority given it to grant franchises for the construction or operation of railroads on its streets. Under the general law of the state, however, a railroad corporation was authorized, when necessary and convenient in the location of its road ‘to appropriate any part of any public road, street or alley or public grounds’ but if it desired to appropriate a street within the limits of an incorporated town or city, the company was required to locate its road upon such street as the local authorities might designate. (Sec. 5077-5078 B. & C. Comp.)

“The plaintiff contends that this legislation and the Ordinance of the city designating the street upon which its grantee should locate its road gave to the grantee and its successors or assigns a perpetual right or franchise to use the street for railway purposes, which cannot be revoked or impaired by subsequent legislation, and that Ordinance No. 16491 is void, so far as it prohibits the use of steam locomotives or freight cars on or along the street because first: it impairs the obligation of the contract under which the road was located, and interferes with vested rights of property. Second: it deprives the plaintiff of its property without due process of law. Third: it deprives it of the equal protection of the laws. And Fourth: it is an unlawful interference with Interstate Commerce.

“The position of the City on the other hand is first that at the time of the passage of Ordinance

No. 599 the city had no power or authority to grant franchises for the use of its streets for railway purposes. Second: that such ordinance was merely a license or permission on the part of the Council to the grantee named therein to use the street, revocable at any time. Third: that the grant was personal to the grantee, and it had no power or authority to assign or transfer the rights thereby granted without the consent of the city. And fourth: that by the terms of the ordinance the city reserved the right to regulate the use of the street for railway purposes to the exclusion of steam locomotives and freight cars therefrom whenever in the judgment of the Council such legislation was necessary or advisable.

"I do not deem it necessary to consider all of these questions at this time. In any view, the city was vested with the right and power at the time Ordinance No. 599 was passed to designate the street upon which the company should locate its road, and this carried with it the power to impose reasonable conditions to such grant or permission which, when accepted by the grantee, became binding upon it. *Pittsburg C. & St. Ry. vs. Hood*, 94 Fed. 618. *Southern Bell Tel. & Tel. Co. vs. City Mobile*, 162 Fed. 523.

"Whether the ordinance is considered a franchise, license or mere permission, it gave the consent of the city to the use of the street for railway purposes upon certain terms and conditions, and when accepted became in effect a contract between the city and the company. It may be conceded for the purpose of this case that the city could not subsequently revoke the permission thus given or impair or destroy the rights thereby conferred. No

attempt is made to do so by Ordinance No. 16491. Its only purpose is to regulate the use of the railroad. The passage of Ordinance No. 599 did not deprive the city of its police power. *N. P. vs. State of Minnesota*, 208 U. S. 583; *Beer Co. vs. Mass.*, 97 U. S. 25; *Mugler vs. Kansas*, 123 U. S. 623, nor of the right to exercise the power and authority expressly reserved and stipulated in the contract between it and the railroad company. The grant or permission was made or given by the city and accepted by the company upon the terms and conditions therein specified which, among other things, included the right of the city to make regulations for the conduct of the road at any time the Common Council might deem proper, to regulate the speed of the cars and locomotives and to restrict and prohibit the running of locomotives at such times and in such manner as the Council may deem necessary. The authority thus reserved is broad and general in its terms, and while a technical construction of some of the language may support the argument of the plaintiff that it was thereby intended to reserve the power to regulate and not prohibit the use of steam locomotives, I think the plain intention was to reserve the right to make such rules and regulations covering the operation of the road as might, from time to time, be necessary even to the extent of prohibiting the use of steam locomotives or freight cars whenever such legislation might be necessary for the safety or convenience of the public. If, however, the language of the ordinance is involved or doubtful, it should be construed against the grantee and in favor of the public for, as said by the Supreme Court in *O. R. N. vs. The Oregonian Ry.*, 130 U. S. 1, 'when a statute makes a grant of property, powers or franchises to a private corporation or to a

private individual, the construction of the grant in doubtful points should always be against the grantee, and in favor of the government.' See also to the same effect *Freeport Wtr. Co. vs. Freeport City*, 180 U. S. 587; *Burns vs. Multnomah Ry. Co.*, 15 Fed. 177.

"I conclude therefore that the legislation complained of is valid because within the powers reserved to the city by the ordinance under which the plaintiff is now occupying the street.

"But if I am mistaken in this view it is still, in my opinion, valid because within the general police power of the city. The grant, permission, license or authority, whatever it may be called, of plaintiff's grantor to occupy the street for railway purposes was necessarily made and accepted subject to the right of the city, under its police power, to make such regulations concerning the use thereof as the public safety and welfare might from time to time require. The legitimate exercise of legislative power in securing the public safety, health and morals is not within the inhibition of the Federal Constitution against the impairment of obligations of contracts, the deprivation of property without due process of law, or the equal protection of the laws, for as said by Mr. Chief Justice Fuller, 'The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.' *N. Y. & N. E. R. R. vs. Bristol*, 151 U. S. 567. Every grant therefore of a public franchise or right is subject to the legitimate exercise of police power by the state or municipality and it has been decided that the power

to order and establish suitable police regulations authorizes municipal corporations to prohibit the use of steam locomotives in the public streets when such action does not interfere with vested rights. *R. R. Co. vs. Richmond*, 96 U. S. 521.

"There is no express stipulation in Ordinance No. 599 that the grantee should be permitted to use steam locomotives as a motive power for the propelling of trains over the road therein specified, or that it might use freight cars thereon. The right granted was simply to lay 'a railroad track and run cars over the same' and nothing is said about motive power or the character of the cars. The grantee therefore occupied the street subject to the general power the city in respect to the use of the road when constructed. The legislation complained of therefore does not impair any vested rights expressly given by the ordinance, and it is not for the court to determine in this case whether the power reserved to the city has been judicially exercised. It is clearly not void as an unreasonable or arbitrary exercise of such power. At the time the city granted to the plaintiff's predecessors in interest authority or permission to occupy Fourth Street for railway purposes, the street was an unimproved back street with scattering dwellings along it and no business houses. It is now practically in the heart of the business district and is one of the principal business streets of the city. It is frequented daily by a large number of persons, teams and vehicles constantly traveling along and across the street during business hours. It is quite steep throughout the business district, and the noise, vibration, smoke, cinders and soot from the moving steam locomotives and trains seriously interfere with the transaction of public and private

business, and it is a constant source of danger and inconvenience to the public.

"The court therefore cannot declare that the provisions of the ordinance sought to be enjoined are unreasonable or arbitrary, and since it is within the legitimate police power of the municipality, it must be upheld.

"It follows that the complaint must be dismissed and it is so ordered."

Grantee, under Ordinance No. 599, accepted it subject to the reserved power therein to exclude locomotives and freight cars from Fourth Street.

Mr. McQuillin, in his new work on Municipal Corporations (2 Ed.) Section 763, says:

"When privileges, franchises, etc., of the character under consideration, are granted, either by the state or municipal corporation, the practice generally prevails to reserve the power to alter, amend or repeal whenever the public interest may require, and this question is solely within the discretion of the legislative authorities. Such reservation may be in the State Constitution, legislative act, municipal charter or in the law or ordinance granting the franchise. Where the power to regulate the franchise and impose conditions is reserved no question as to the impairment of the obligation of the contract can arise if the legislative authorities choose to impose additional burdens upon the enjoyment of the franchise. The reserved power authorizes the making of any alteration or amendment which will not defeat or substantially impair the object of the grant or any rights vested under

it. 'The power of alteration and amendment is not without limitation, but must be in good faith and consistent with the specific object of the charter.'

"The reserved power to alter or amend will be construed favorably to the public. Thus, under a statute conferring power to regulate water rates which are required to be 'fixed by ordinance,' the power was construed as continuing and authorized changes in rates from time to time as might be deemed necessary and just, both to the company and the public."

Mr. Nellis, in his work on Street Railways, Section 46, Vol. I, says:

"Where a franchise is granted by an ordinance and accepted by the company, the acceptance of the privileges conferred thereby carries with it the acceptance of the burdens imposed. Obligations in the nature of a contract are created and the doctrine applies that one who takes the benefits secured to him by contract cannot refuse to comply with the obligations imposed upon him thereby. A company seeking a franchise may accept the one granted or not, as it chooses, and if it accepts it the franchise is taken subject to the conditions imposed. The franchise granted to the street surface railroad company and accepted by it constitutes a contract. Therefore every condition imposed by the abutting property owners of the 'local authorities,' which does not nullify or modify limitations and restrictions already imposed by law in favor of the public, and which imposes upon the grantee still greater restrictions and limitations for the public advantage, must be strictly complied with. Their power to grant or withhold consent to the

construction of street railroads is generally absolute and they may impose any conditions, however onerous or difficult to perform, which do not limit or restrict the rights of the public, as the terms upon which their consent will be given. If the terms imposed by abutting property owners are unreasonable, the company may proceed as if their consent were refused. If, however, it choose to act upon such consent it must comply with the terms of its contract. It is a general rule that grants of privileges to street railway companies by municipal corporations should be strictly construed against the grantee. But though street railway franchises are to be strictly construed, yet when the intention of the parties is clear, that intention should be given effect. What the parties, expressly or by necessary implication, contract to give or to do, they must be compelled to give or to do. The franchise carries with it not only the rights and conditions expressed, but those also which are necessarily to be implied, that is to say, those which are not simply convenient, but indispensable. It is, however, a well-settled principle that no implication will be indulged in derogation of the rights of the public, in the absence of express or plain terms of grant. An intention to grant an exclusive privilege or monopoly will not be implied, nor will a grant of privileges be given scope and effect, in restriction of public right, beyond what the plain words employed require. This is an established principle applicable in the construction of grants by the State, and it is equally applicable in the construction of grants or privileges by a municipal corporation affecting public rights. As illustrating these principles, a provision of the franchise giving the railroad company the privilege of laying all

necessary sidings, connections and switches for the proper working and accommodation of the railroad in specified streets does not justify a substantial addition to its road which is not a mere adjunct of its authorized line. Because the ordinance imposes certain terms accepted by the company as consideration, the company is not relieved from liability for license fees imposed upon electrical poles and wires as a police regulation. Again, where the company is authorized to operate a street car system in connection with which it maintains a car barn fronting on one street with its sides abutting on others, it is entitled to bring in and take out its cars over tracks upon the side streets, although such right is not expressly granted in the ordinance. And where a franchise authorized the construction of a street railway in a certain county through the streets of certain named villages, it was construed as authorizing the company to make a necessary connection on a street of one of the villages named with a branch line built through one of the other villages. Under authority to construct 'a horse railroad track or tracks' the railroad may be operated by electricity; and where it is authorized to operate by any motive power it may deem expedient and proper, it is not confined to the animal and steam power known or in practical use at the time of the grant, but it may use the electrical trolley system. Mandamus will issue to compel the performance of the obligations imposed upon a street railway company by the franchise which it has accepted and is acting under. But the observance of the conditions imposed by the local authorities when granting the franchise can only be enforced by the local authorities, unless it be a matter of such public concern that any citizen, in the interest of the public, may compel it. The federal court

has jurisdiction to grant relief by injunction in case an ordinance relating to street railways impairs an existing contract right or practically constitutes the taking of property without due process of law."

In *Railroad Co. v. Richmond*, 96 U. S. 521, an ordinance of the Council of the City of Richmond, passed September 8, 1873, provided that no engine belonging to the Richmond Railroad Company should be used on Broad Street in that city, and the final adjudication of the question came before this court. It was contended that said ordinance was unconstitutional and void, because, (1) it impaired the obligations of the contract contained in the charter of the company, which, as was claimed, granted to the company the right to propel its cars by steam, as well within the city as without; (2) it deprived the company of its property without due process of law; and, (3) it denied the company the equal protection of the laws.

The ordinance authorizing the location of the railroad contained the following stipulation: "Provided that the corporation of Richmond shall not be considered as hereby parting with any power or chartered privilege not necessary to the railroad company for constructing the said railroad and connecting the same with the depot of said company within the limits of the city."

Mr. Chief Justice Waite delivered the opinion of this court and said:

"The questions for determination in this case are:

"1. Does the municipal legislation complained

of impair the vested rights of the company under its charter?

"In answering this question, it becomes necessary to determine at the outset what the rights of the company, secured by its charter and affected by the ordinance in dispute, actually are. The right is granted the company to construct a railroad 'from such point within the corporation of Richmond, to be approved by the common council.' No designated point is fixed by the charter. That is left to the discretion of the company, subject only to the approval of the city. The power to approve certainly implies the power to reject one location and accept another; and this necessarily carries with it the further power to reserve such governmental control over the company in respect to the road, when built within the city to the point approved, as may seem to be necessary. The absolute grant of the charter is satisfied if the road is built within the city for any distance, by any route, or to any point. The company, however, desired to pass through Broad Street, and, for the present, to terminate the road upon the lots purchased for shops and warehouses, and requested the city to approve of that location. This the city was willing to do, upon condition that it should not be considered as thereby parting with any power or chartered privilege not necessary to the company for constructing its road or connecting it with the depot. These terms were proposed to the company, and accepted. At that time the city was vested with all the powers 'necessary for the good ordering and government' of persons and property within its jurisdiction. By the conditions imposed, these powers were all reserved, except to the extent of permitting the company to

construct its road upon the route designated, and connect it with the depot. All the usual and ordinary powers of the city governments over the road when constructed, and over the company in respect to its use, were expressly retained. The company, therefore, occupied Broad Street upon the same terms and conditions it would have if the charter had located the route of the road within the city, but, in terms subjected the company to the government of the city in respect to the use of the road when constructed.

"Nothing has been done since to change the rights of the parties. It is true that an attempt was made by the residents on Shockhoe Hill to induce the council to prohibit the use of locomotives within the city, and to require the company to so construct the road within Broad Street as to facilitate the crossing of the track; but all parties seemed pany to run its engines slowly and with care in the city, and its liberal contribution towards the expense of paving the street. There is nowhere in the proceedings an indication of a relinquishment by the city of its governmental control over the company or its property. The 'compromise of interests' proposed related alone to the plan of the pavement."

"It remains only to consider whether the ordinance complained of is a legitimate exercise of the power of a city government. It certainly comes within the express authority conferred by the amendment of the city charter adopted in 1870; and that, in our opinion, is no more than existed by implication before. The power to govern implies the power to ordain and establish suitable to be satisfied then with the proposition of the com-

police regulations! and that, it has often been decided, authorizes municipal corporations to prohibit the use of locomotives in the public streets, when such action does not interfere with vested rights.

“Such prohibitions clearly rest upon the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of the police power; and it was not seriously contended upon the argument that they did not come within the legitimate scope of municipal government, in the absence of legislative restriction upon the powers of the municipality to that effect. It is not for us to determine in this case whether the power has been judiciously exercised. Our duty is at an end if we find that it exists. The judgment of the court below is final as to the reasonableness of the action of the Council.

“We conclude, therefore, that the ordinance does not impair any vested right conferred upon the company by its charter.

“2. Does it deprive the company of its property without due process of law?

“This question is substantially disposed of by what has already been said, as the claim of the company is based entirely upon the assumption of a vested right, under its charter, to operate its road by steam, both within and without the city, which we have endeavored to show is not true. All property within the city is subject to the legitimate control of the government, unless protected by ‘contract rights,’ which is not the case here. Appropriate regulation of the use of property is not ‘taking’ property, within the meaning of the constitutional prohibition.

"3. Does it deny the company the equal protection of the laws?

"The claim is, that, as this company is alone named in the ordinance, the operation of the ordinance is special only, and, therefore, invalid. No other person or corporation has the right to run locomotives in Broad Street. Consequently, no other person or corporation is or can be in like situation, except with the consent of the city. On this account, the ordinance, while apparently limited in its operation, is in effect general, as it applies to all who can do what is prohibited. Other railroad companies may occupy other streets and use locomotives there, but other streets may not be situated like Broad Street, neither may there be the same reasons why steam transportation should be excluded from them. All laws should be general in their operation, but all places within the same city do not necessarily require the same local regulation. While locomotives may with very great propriety be excluded from one street, or even from one part of a street, it would be sometimes unreasonable to exclude them from all. It is the special duty of the city authorities to make the necessary discriminations in this particular.

"On the whole, we see no error in the record, and the judgment is affirmed."

The Pacific Railroad Company v. Leavenworth Fed. Case No. 10649 (1 Dill. 393). The Pacific Railroad Company located its tracks on the streets of the City of Leavenworth, Kansas, under a statute of that State, reading as follows: "Every railroad corporation may construct its road across, along or upon * * * any

street, highway, &c., but the company shall restore the same to its former state, &c. Nothing herein contained shall be construed to authorize the construction of any railroad not already located in, upon, or across any street in any corporate city or town without the assent of the corporate authorities of such city." Gen. St. Kan. 1868, p. 202. It was argued in behalf of the complainant that the statute simply clothed the city with the power to say "yes" or "no," but it did not authorize it to stipulate for terms or conditions. The court will note the similarity of the two statutes. Judge Dillon deciding this case, says: "But in this view I cannot concur. Its power is complete and it was undoubtedly the design of the legislature that the city authorities, as the representatives and guardians of the public interest of the city and its inhabitants, should have the power to prescribe as conditions of giving their assent, such lawful and proper terms as they deem expedient." In point, see *Northern Central Railroad Company v. City of Baltimore*, 21 Md. 93. "In the exercise of this authority the city said to the company, 'you may construct your road along Water Street, upon, inter alia, two conditions, 1, You shall, within a given time, build depot buildings of a given character and at a specified place; 2, you shall also grade riprap and pave the levee (which is a part of Water Street, and on and along which the right of way is granted)'. To this the company agreed, not only by the accepting of the grant of the right of way on these conditions, but by executing a contract to this effect. It is now insisted by the company that the city has no lawful power to contract for the erection of depot buildings, and hence so much of

the ordinance and contract as relates to this subject is in excess of its authority and is void. My opinion is otherwise and it is strengthened by an examination of the extensive powers with which it has been the policy of Kansas to clothe its municipal corporations.* * *."

In *Pac. C. & St. L. Ry. Co. v. Hood*, 94 Fed. 618, a railroad company occupied a street in the City of Cincinnati. The ordinance granting this right contained conditions required to be performed by the company, viz., the hours when said track might be used for transmission of freight and passengers was limited from 8 o'clock p. m. to 6 o'clock a. m., and provided that no cars should be drawn over the track at any other hour and at no greater speed than six miles per hour. Cars were run on the track at 6:50 a. m., in violation of the ordinance, and Hood's horses became frightened, ran away and caused injuries, from which he died. In an action for damages the Circuit Court of Appeals, for the Sixth Circuit, had occasion to construe the ordinance. The Court said: "If authority is given to construct a railroad upon the streets of a city or town, provided the company first obtains the consent of the municipal corporation, or whereby the delegation of power from the legislature, the municipality itself grants the right, reasonable conditions may be annexed to the grant and imposed upon the company, as to the construction and operation of its road, such as are deemed essential for the protection of the public interest and safety; and if these are accepted by the railway company they are binding upon the parties. * * * It is this legislative authority, derived either immediately or through the authorized action of the municipality,

which protects a railroad company in the use of streets for railroad purposes from prosecution and suit for a public nuisance; and when the consent of a city or town is required, the importance of an ordinance like the one in question is apparent. When the ordinance prescribes conditions on which the right is granted these become binding and the right to use the streets must be exercised strictly within the provisions of the ordinance. *Railroad Company v. Bingham*, 87 Tenn. 522, is a leading and instructive case upon this subject."

"It is conceded, and could not be controverted, that the legislature of Ohio conferred upon the city power to grant the right to construct and use the railroad upon the public landing, with power to annex conditions. The existence of the power to consent to such use of the streets and highways in the city, and the power to impose valid and binding conditions, were fully recognized in the well-considered case of *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 22 C. C. A. 534, and 76 Fed. 296; *Id.*, 78 Fed. 307. It will admit of the question whether, in the absence of constitutional or legislative restriction, municipal corporations, by virtue of the police authority over streets, and the power to protect the safety of persons and property, might not impose, by ordinance duly enacted, conditions upon the operation of a railway through the streets of a city, similar to the provisions contained in the ordinance now in question. 1 Dill. Mun. Corp. (4th Ed.) §§393, 713; *Richmond, F. & P. R. Co. v. City of Richmond*, 96 U. S. 521; *Chicago, B. & Q. R. Co. vs. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513; *Gaslight Co. v. Murphy*, 170 U. S. 78, 18 Sup. Ct. 505. It being established, and here conceded, that the city was vested with power to

make the grant with conditions annexed, it is necessary for us to decide to what extent the power to impose conditions could exist in the absence of express legislative authority to do so. It is not to be doubted that the purpose of the legislature in conferring upon the municipality the power to consent to the use of the public landing with conditions was to enable the city to properly exercise its police power in the protection of persons and property against great danger in a public and much used place, such as this landing. And in this view it is not open to reasonable question that the ordinance as enacted combines contractual as well as police provisions, the latter being in the interest of the public safety. In so far as the ordinance granted the right of franchise to construct and operate a railway upon this public ground, it became, when accepted, a contract; but the provision by which the use of the track was prohibited during the day time was in its nature and effect a municipal or police regulation operating in the interest of the public safety. *McDonald v. Railway Co.*, 43 U. S. App. 79, 20 C. C. A. 322, and 74 Fed. 104; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369; *Joy v. City of St. Louis*, 138 U. S. 42, 11 Sup. Ct. 243. This police provision having been enacted pursuant to clear legislative authority, the fact that it is found in an ordinance, which also contains contract provisions does not change the result or affect the essential character of the power exercised; and this police provision, being thus specifically authorized and duly enacted, unquestionably has, within the corporate limits, the force of a law enacted by the legislature of the State. *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369; *Robbins v. City of Chicago*, 4 Wall. 657; *City of Chicago v. Robbins*, 2 Black, 418; *Doran v. Flood*,

47 Fed. 543; *McDonald v. Railway Co.*, 43 U. S. App. 79, 20 C. C. A. 322, and 74 Fed. 104; 1 Dill. Mun. Corp. (4th Ed.) §§308, 393. It results from this view that the operation of the railroad by plaintiff in error during the day time, contrary to the provisions of the ordinance was a violation of the law, and constituted a nuisance."

Mr. Dillon in his work on *Municipal Corporations* (5th Ed.), Vol. 111, §1229, p. 1952, says:

"So far as concerns the power of the municipality to attach conditions and restrictions to a grant or consent, no fundamental distinction appears in the decisions between a general delegation of authority to a municipality to grant consents or rights to use streets for railroad, telegraph, telephone, and other public purposes, and a simple requirement, whether constitutional or statutory, that no streets shall be used for these purposes without the consent of the municipality. The power possessed by the state to attach as a condition to the grant of a franchise to a quasi-public corporation the performance of duties beneficial to the public may be exercised by the municipality under a delegated power to grant to such a corporation the use of its streets; and when, under the Constitution or the statutes of a State, a railroad company or other public service corporation is forbidden to construct its railroad, telegraph, or telephone line, or other structures in or upon the streets of a city 'without the consent of' the city or of specified local authorities, the municipal authorities are not limited to a simple granting or denial of the right of way, but may prescribe conditions on which the consent is given, and valid conditions or restric-

tions accepted by the railroad or other public service corporation are binding upon the parties." And in support of his text he cites the following cases:

- Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521;
- Pacific R. Co. v. Leavenworth, 1 Dill. C. C. R. 393;
- Pittsburg, C. & St. L. R. Co. v. Hood, 94 Fed. Rep. 618;
- Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 Fed. Rep. 347;
- Southern Bell T. & T. Co. v. Richmond, 103 Fed. Rep. 31, aff'g. 98 Fed. Rep. 671;
- Bellville v. Citizens' Horse R. Co., 151 Ill. 171;
- Indianapolis & C. R. Co. v. Lawrenceburg, 34 Ind. 304;
- City R. Co. v. Citizens' St. R. Co. (Ind.), 52 N. E. Rep. 157;
- Mordhurst v. Ft. Wayne & S. W. Traction Co., 163 Ind. 268;
- Postal Tel. & Cable Co. v. Newport (Ky.) 76 S. W. Rep. 159;
- Northern Cent. R. Co. v. Baltimore, 21 Md. 93;
- Rapid R. Co. v. Mt. Clemens, 118 Mich. 133;
- Traverse City Gas Co. v. Traverse City, 130 Mich 17;
- Detroit v. Detroit City R. Co., 76 Mich. 421;
- Springfield v. Robberson Ave. R. Co., 69 Mo. App. 514;
- Humphreys v. Bayonne, 55 N. J. L. 241, 243;

- Rutherford v. Hudson River Traction Co., 73 N. J. L. 227;
- Jersey City & B. R. Co. v. Jersey City & H. H. R. Co., 20 N. J. Eq. 61, 360;
- People v. Barnard, 110 N. Y. 548;
- Allegheny v. Millville, E. & S. St. R. Co., 159 Pa. 411;
- Plymouth v. Chestnut Hill & N. R. Co., 168 Pa. 181;
- Allegheny v. People's Nat. Gas & P. Co., 172 Pa. 632;
- Philadelphia v. Empire Passenger R. Co., 177 Pa. 382;
- Minerville v. Schuylkill Elect. R. Co., 205 Pa. 394;
- McKeesport v. Pittsburg, M. & C. R. Co., 213 Pa. 542, 544;
- Muncy Elect. L. H. & P. Co. v. People's Elect. L. H. & P. Co., 218 Pa. 636;
- Spring City v. Montgomery & C. Elect. R. Co., 35 Pa. Super. Ct. 533, 538.

Under the Massachusetts statute an application to a municipality for the location of a street railroad must precede the exercise of corporate power by the company, and conditions attached to the location must also be accepted by the company, hence these conditions, if lawful, are qualifications of the corporate right of the company and it cannot, while it continues to exercise its franchises, complain of their enforcement. *Clinton v. Worcester St. Ry. Co.*, 199 Mass. 279. In New Jersey restrictions and conditions attached to the municipality's location of the tracks of a street railroad company

are obligatory upon purchases of the railway and its franchises without an express assumption thereof.

Rutherford v. Hudson River Traction Co., 73
N. J. L. 227.

Counsel for appellant in error attempts to draw a distinction between Sections 6841 and 6842. That is, he contends that where a railroad company desires to locate its tracks on a county road, then the County Court is authorized to agree upon the extent, terms and conditions upon which the use of the road may be appropriated, but where it is desired to locate the road on a street, or highway within the limits of a municipality, then the municipality can only designate the particular road or street; that it is not authorized to agree upon terms or authorized to make conditions respecting the occupancy of the street. The Supreme Court of Oregon, however, as we view its decisions, has construed both of these sections together, in *McQuaid v. Portland-Vancouver Ry. Co.*, 18 Ore., p. 248, (Sections 3242 and 3243 mentioned in said opinion now being Sections 6841 and 6842, L. O. L.), and says:

"Section 3242 thereof authorizes a corporation organized for the construction of any railway, etc., whenever it shall be necessary or convenient, in the location of its road, to appropriate any such public road, etc., to appropriate so much thereof as may be necessary or convenient in the location and construction of its road; and it authorizes the county court of the county wherein such public road, etc., may be, unless within the corporate limits of a municipal corporation, to agree with the corporation constructing the road upon the ex-

tent, terms and conditions upon which the same may be appropriated, or used and occupied, by such corporation. And Section 3243 thereof provides, in effect, that if the public highway or grounds be within the limits of any town, whether incorporated or not, that such corporation shall locate its road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section (referring to section 3242) and having charge thereof, shall designate. The two sections, however, respectively provide,—the former one, that, if such county court and corporation shall be unable to agree upon the extent, terms and conditions upon which the public road, etc., may be appropriated, etc., such corporation may appropriate so much thereof as may be necessary and convenient in the location and construction of its road; and the latter one, that if such local authorities shall fail or refuse to designate the particular road, etc., upon which such corporation shall locate its road, within a reasonable time, when requested, the corporation may make such appropriation without reference thereto. These provisions of the statute are **ambiguous, unsatisfactory and absurd**; and about all that can be gathered from them is that they authorize the appropriation by a railway corporation of so much of a public road or street as may be **necessary and convenient** in the location and construction of its road. The appropriation, however, is only of a part of the easement or use secured to the public in the land embraced within the public road or street. The legislative jurisdiction in such matters is limited to a control of the use which belongs to the public, and it should not be presumed that the legislature intended to exercise it in violation of private rights and interests. It au-

thorizes the appropriation of the part of the public road or street as such and amounts to no more than a partial change of the manner of its use. It does not attempt to interfere with the private rights of the owners of the land abutting upon the road or street; and I doubt very much whether the legislature has the legal right, by such an act, to destroy or seriously impair rights of that character. They are virtually private property, and cannot be taken by a railway corporation without compensation being first made or secured in such manner as may be prescribed by law. Article 11, § 4, Const. Or. I do not regard the occupation of a public highway by a railway corporation, under the appropriation authorized by the statute in question, as anything more than a **kind of sufferance**. The railway corporation is permitted by the statute to appropriate so much of the highway as may be necessary or convenient in the location and construction of its road; but the use thereof by the public is not abridged. It is simply extended to the railway corporation, and the latter admitted to its enjoyment in common with the former."

We contend, therefore, that the provisions of Ordinance No. 599, reserving power to regulate and prohibit steam locomotives, are valid and binding on the grantee therein.

City of Portland could not contract away its Police Power, and, therefore, could lawfully enact and enforce Ordinance No. 18491, under such power.

Mr. Joyce in his work on franchises, Section 138, says:

"Again, it is not within the power of the State to permanently divest itself, by action or inaction

of its police powers, and this is also true as to any subordinate subdivision or agency of the State, acting under a delegation of authority from the State; nor can a State by any contract divest itself of the power to make police regulations. The right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise, as it is immaterial upon what consideration the attempted contract is based. The exercise of the police power in the interest of the public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution; so an ordinance of a municipality, valid under the state law as construed by its highest court, which compels a railroad to repair a viaduct constructed, after the opening of the railroad by a city in pursuance of a contract relieving the railroad, for a substantial consideration, from making any repairs thereon for a term of years is not void under the contract or the due process clause of the Constitution."

Under the laws of Oregon at the time of the organization of the Oregon Central Railroad Company the constitution of Oregon provided among other things as follows:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. * * * All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights." (Constitution of Oregon, article II, § 2.)

In *Ex parte Koehler*, 23 Fed. 529, it was held that the vested right of a railroad company to collect reasonable fares and charges was like all other interests, subject to the police power of the State, and as said by the Supreme Court of Oregon in the *Portland Ry. L. & P. Co. v. Railroad Commission*, 105 Pac. at page 713: "A grant by the Legislative Assembly to a corporation of authority to employ the right of eminent domain necessarily implies a reservation of the police power to regulate and prescribe the measure of compensation which is determined to be reasonable, and which may be collected for transportation of passengers and freight; and, if a common carrier could, by a contract stipulating the continuance of a specified rate of fares and freight for a given time, prevent any interference with such agreement, by invoking the clauses of the organic act relied upon herein, it would thereby become superior to the Legislature, which doctrine will never be acknowledged by courts. The police power, being necessary to the preservation of the rights of the citizen and to the maintenance of the autonomy and the authority of the state, cannot be bargained away in any manner whatever." The Legislature, therefore, could not by a general law authorizing railroad companies to locate their roads in city streets subject to the consent of the municipality, or even without the consent of a municipality in case of a lack of agreement under the constitutional reservation herein quoted, forever contract away its right under the police power to regulate such railroads.

The charter of the City of Portland in force at the time of the enactment of Ordinance No. 16491 provided as follows:

"Section 3: The City of Portland shall be in-

vested within its limits with authority to perform all public services and with all governmental powers except such as are expressly conferred by law upon other public corporations and subject to the limitations prescribed by the constitution and laws of the state, except as hereinafter provided."

"Section 72: The Council shall have and exercise exclusively all legislative powers and authority, of the City of Portland and no legislative powers or authority, either express or implied, shall be exercised by any other person or persons, board or boards, other than the Council. The Council shall have full power and authority, except as herein otherwise provided, to exercise all powers conferred upon the city by this Charter and the constitution and laws of the State of Oregon."

"Section 73: The Council has power and authority, subject to the provisions, limitations and restrictions in this Charter contained:

"(1) To exercise within the limits of the City of Portland all the powers commonly known as the police power to the same extent as the State of Oregon has or could exercise said power within said limits.

"(60) Except as otherwise provided in this Charter or in the constitution of laws of the State of Oregon, to regulate and control for any and every purpose the use of the streets, highways, alleys, sidewalks, public thoroughfares, public places and parks of the city; to regulate the use of streets, roads, highways and public places for foot passengers, animals, bicycles, automobiles and vehicles of all descriptions.

“(63) To control and limit traffic on the streets, avenues and elsewhere.”

Sections 94, 103, 104, 105 and 107 of the Charter of the City of Portland, provide:

“(Section 94) The Council may, subject to the limitations and conditions contained in this charter, grant for a limited time specific franchises or rights in or to the public property or places mentioned in the preceding sections. Every such grant shall specifically set forth and define the nature, extent and duration of the franchise or right thereby granted, and no franchise or right shall pass by implication. At all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the Council and said power and right cannot be divested or granted.”

“(Section 103) “The Council has power and authority by ordinance duly passed to agree with any corporation, firm or person constructing a commercial railroad and desiring to enter the city, upon the extent, terms and conditions upon which the streets, alleys or public grounds of the city may be appropriated, used or occupied by such railroad, and upon the manner, terms and conditions under which the cars and locomotives of such railroad may be run over and upon such streets, alleys and public grounds; such agreement shall be subject to the provisions and requirements of Sections 95, 97, 100 and 101 of this Charter. No exclusive right for the aforesaid purposes shall be granted to any corporation, firm or person and the use of all such rights shall at all times be subject to regulation by the Council.

"In addition to the other requirements of this Charter, every ordinance granting such right shall be upon the condition that such grantee shall allow any other railroad company to use in common with it the same track or tracks upon obtaining the consent of the Council expressed by ordinance, each paying an equitable and proper portion for the construction and repair of the tracks and appurtenances used by such railroad companies jointly."

"(Section 104) No exclusive franchise or privilege shall be granted for the laying of pipes, wires or conduits or for the use of any street, alley, highway or other public place or part thereof, and no grantee of such franchise or privilege shall be entitled to sub-let the same or allow any other to use the same without the consent of the city expressed by ordinance duly passed."

"(Section 105) The Council of the City of Portland shall have at all times power to regulate by ordinance street railroads, tramways and other railroads and the use of tracks and cars; to compel the owners of two or more such roads using or having the right to use the same streets, bridges or elevated railways, for any distance not exceeding five blocks over said street, and over the entire length of bridges and elevated roadways to use the same tracks and to divide the cost of construction and cost of maintenance thereof equitably between them; to regulate the rates of speed and the use of streets by street railways and other railroads and to pass ordinances to protect the public from danger or inconvenience in the operation of such roads."

"(Section 107) No franchise shall be granted for any extension over streets or public places of the city to any street railway company or to any

one for its use for a longer period than the life of the franchises held, owned by and under which said company is operating which has the longest period to run and no such franchise shall be granted for a longer period than twenty-five years."

In *Northern Pacific Railway Company v. Duluth*, 208 U. S. 583, this Court, speaking through Justice Day, said:

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of the contracts. In *New York & New England Railroad Company v. Bristol*, 151 U. S. 556, 576, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from in-

jury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Barbier v. Connolly*, 113 U. S. 27; *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 350; *Mugler v. Kansas*, 123 U. S. 623; *Budd v. New York*, 143 U. S. 517.'

"The principle was recognized and enforced in *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 226, where it was held that the expenses incurred by the railroad company in erecting gates, planking at crossings, etc., and the maintenance thereof, in order that the road might be safely operated, must be deemed to have been taken into account when the company accepted its franchise from the State, and the expenses incurred by the railroad company, though upon new streets, might be required as essential to the public safety. In *Detroit Railroad Co. v. Osborne*, 189 U. S. 383, it was held that the State of Michigan might compel a street railroad to install safety appliances at an expense to be divided with a steam railroad company occupying the same street, notwithstanding the steam railroad was the junior occupier of the street. The subject was further under consideration in *New Orleans Gas Light Co. v. Drainage Commission of New Orleans*, 197 U. S. 453, where it was held, that although the gas company had permission from the city to lay its pipes under the streets, it might be required to remove the same at its own expense, in the exercise of the police power in the interest of the public, in order to make way for a system of drainage which was required, in the interest of the public health, without compensation to the gas company; and that uncompensated obedience to regulations for public safety under the police power of the State was not a taking of property without a due process of law.

"The same principles were recognized and the previous cases cited in *Chicago, Burlington & Quincy Ry. Co. v. People of the State of Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, and again in *Union Bridge Co. v. United States*, 204 U. S. 364. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.

"In this case the Supreme Court of Minnesota has held that the charter of the company, as well as the common law, required the railroad, as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in this behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy and void. This doctrine is entirely consistent with the principles decided in the cases referred to in this court. But it is alleged that at the time this contract with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State or the municipality to abrogate this power so necessary to the public safety. *Chicago, Burlington & Quincy R. R. Co. v. Nebraska ex rel Omaha*, 170 U. S. 57."

In *Fertilizing Co. v. Hyde Park*, 97 U. S., at page 663, Mr. Justice Swayne said:

"This case was brought here by a writ of error to the Supreme Court of the State of Illinois.

"The alleged ground of our jurisdiction is, that the record presents a question of Federal jurisprudence. A brief statement of the facts will be sufficient for the purposes of this opinion.

"The plaintiff in error was incorporated by an act of the legislature, approved March 8, 1867. The act declared that the corporation should 'have continued succession and existence for the term of fifty years.' The fourth and fifth section are as follows:

" 'Sect. 4. Said corporation is hereby authorized and empowered to establish and maintain chemical and other works at the place designated herein, for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, and into other chemical products, by means of chemical, mechanical, and other processes.

" 'Sect. 5. Said chemical works shall be established in Cook County, Illinois, at any point south of the dividing line between townships 37 and 38. Said corporation may establish and maintain depots in the City of Chicago, in said county, for the purpose of receiving and carrying off, from and out of said city, any and all offal, dead animals, and other animal matter, which they may buy or own, or which may be delivered to them by the city authorities and other persons.'

"The company organized pursuant to the charter.

Its capital stock is \$250,000, all of which has been paid up and invested in its business.

"It owns ground and has its receiving depot about three miles from Chicago. The cost of both exceeded \$15,000. Thither the offal arising from the slaughtering in the city was conveyed daily. The chemical works of the company are in Cook County, south of the dividing line of townships 37 and 38, as required by the charter. When put there, the country around was swampy and nearly uninhabited, giving little promise of further improvement. They are within the present limits of the village of Hyde Park. The offal procured by the company was transported from Chicago to its works through the village by the Pittsburg, Fort Wayne, and Chicago Railroad. There was no other railroad by which it could be done. The court below, in its opinion, said:

" 'An examination of the evidence in this case clearly shows that this factory was an unendurable nuisance to the inhabitants for many miles around its location; that the stench was intolerable, producing nausea, discomfort, if not sickness, to the people; that it depreciated the value of property, and was a source of immense annoyance. It is, perhaps, as great a nuisance as could be found or even created; not affecting as many persons as if located in or nearer to the city, but as intense in its noisome effects as could be produced. And the transportation of this putrid animal matter through the streets of the village, as we infer from the evidence, was offensive in a high degree both to sight and smell.'

"This characterization is fully sustained by the testimony.

"In March, 1869, the charter of the village was revised by the legislature, and the largest powers of police and local government were conferred. The trustees were expressly authorized to 'define or abate nuisances which are, or may be, injurious to the public health,'—to compel the owner of any grocery-cellar, tallow-chandler shop, soap factory, tannery, or other unwholesome place, to cleanse or abate such place, as might be necessary, and to regulate, prohibit, or license breweries, tanneries, packing-houses, butcher-shops, stock-yards, or establishments for steaming and rendering lard, tallow-offal, or other substances, and all establishments and places where any nauseous, offensive, or unwholesome business was carried on. The sixteenth section contains a proviso that the powers given should not be exercised against the Northwestern Fertilizing Company until after two years from the passage of the act. This limitation was evidently a compromise by conflicting parties.

"On the 5th of March, 1867, a prior act, giving substantially the same powers to the village, was approved and became a law. This act provided that nothing contained in it should be construed to authorize the officers of the village to interfere with parties engaged in transporting any animal matter from Chicago, or from manufacturing it into fertilizer or other chemical product. The works here in question were in existence and in operation where they now are before the proprietors were incorporated.

"After the last revision of the charter the municipality passed an ordinance whereby, among other things, it was declared that no person should transport any offal or other offensive or unwholesome matter through the village, and that any person

employed upon any train or team conveying such matter should be liable to a fine of not less than five nor more than fifty dollars for each offense; and that no person should maintain or carry on any offensive or unwholesome business or establishment within the limits of the village, nor within one mile of those limits. Any person violating either of these provisions was subjected to a penalty of not less than fifty nor more than two hundred dollars for each offense, and to a like fine for each day the establishment or business should be continued after the first conviction.

"After the adoption of this ordinance and the expiration of two years from the passage of the act of 1869, notice was given to the company, that, if it continued to transport offal through the village as before, the ordinance would be enforced. This having no effect, thereafter, on the 8th day of January, 1873, the village authorities caused the engineer and other employes of the railway company, who were engaged in carrying the offal through the village, to be arrested and tried for violating the ordinance. They were convicted, and fined each fifty dollars. This bill was thereupon filed by the company. It prays that further prosecutions may be enjoined, and for general relief. The Supreme Court of the State, upon appeal, dismissed the bill, and the company sued out this writ of error.

"The plaintiff in error claims that it is protected by its charter from the enforcement against it of the ordinance complained of, and that its charter is a contract within the meaning of the contract clause of the Constitution of the United States. Whether this is so, is the question to be considered.

"The rule of construction in this class of cases

is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court. It may be well to cite a few cases by way of illustration. In *Rector, etc., of Christ Church v. The County of Philadelphia* (24 How. 301), in *Tucker v. Ferguson* (22 Wall. 527), and in *West Wisconsin Railroad Co. v. Board of Supervisors* (93 U. S. 595), property had been expressly exempted for a time from taxation. Taxes were imposed contrary to the terms of the exemption in each case. The corporations objected. This court held that the promised forbearance was only a bounty or gratuity, and that there was no contract. In *The Providence Bank v. Billings & Pittman* (4 Pet. 515), the bank has been incorporated with the powers usually given to such institutions. The charter was silent as to taxation. The legislature imposed taxes. 'The power to tax involves the power to destroy.' *McCulloch v. Maryland*, 4 Wheat. 316. The bank resisted, and brought the case here for final determination. This court held that there was no immunity, and that the bank was liable for the taxes as an individual would have been. There is the same silence in the charter here in question as to taxation and as to liability for nuisances. Can exemption be claimed as to one more than the other? Is not the case just cited conclusive as to both?

"Continued succession is given to corporations to prevent embarrassment arising from the death of their members. One striking difference between

the artificial and a natural person is, that the latter can do anything not forbidden by law, while the former can do only what is so permitted. Its powers and immunities depend primarily upon the law of its creation. Beyond that it is subject, like individuals, to the will of the law-making power.

"If the intent of the legislature touching the point under consideration be sought in the charter and its history, it will be found to be in accordance with the view we have expressed as matter of law. Three days before the charter of the plaintiff in error became a law, the legislature declared that the power of the village as to nuisances should not extend to those engaged in the business to which the charter relates. The subject must have been fully present to the legislative mind when the company's charter was passed. If it were intended the exemption should be inviolable, why was it not put in the company's charter as well as in that of the village? The silence of the former, under the circumstances, is a pregnant fact. In one case it was doubtless known to all concerned that the restriction would be irrepealable, while in the other, that it could be revoked at any time. In the revised village charter of 1869, the exemption was limited to two years from the passage of the act. This was equivalent to a declaration that after the lapse of the two years the full power of the village might be applied to the extent found necessary. Corporations in such cases are usually prolific of promises, and the legislature was willing to await the event for the time named.

"That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the State was applicable and adequate to give an effectual

remedy. That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions. The adjudged cases showing its exercise where corporate franchises were involved are numerous.

"In *Coates v. The Mayor and Aldermen of the City of New York* (7 Cow. (N. Y.) 585), a law was enacted by the legislature of the State on the 9th of March, 1813, which gave to the city government power to pass ordinances regulating, and, if necessary, preventing the interment of dead bodies within the city; and a penalty of \$250 was authorized to be imposed for the violation of the prohibition. On the 7th of October, 1823, an ordinance was adopted, forbidding interments or the depositing of dead bodies in vaults in the city south of a designated line. A penalty was prescribed for its violation. The action was brought to recover the penalty for depositing a dead body in a vault in Trinity churchyard. A plea was interposed, setting forth that the locus in quo was granted by the King of Great Britain, on the 6th of May, 1697, to a corporation by the name of the 'Rector and Inhabitants of the City of New York in Communion with the Protestant Episcopal Church of England,' and their successors forever, as abd for a churchyard and burying place, with the rights, fees, etc.; that immediately after the grant of the land was appropriated, and thenceforward was used as and for a cemetery for the interment of dead bodies; that the rector and wardens of Trinity Church were the

same corporation; and that the body in question was deposited in the vault in the churchyard by the license of that corporation. A general demurrer was filed, and the case elaborately argued.

"The validity of the ordinance was sustained. The court held that 'the act under which it was passed was not unconstitutional, either as impairing the obligation of contracts, or taking property for public use without compensation, but stands on the police power to make regulations in respect to nuisances.' It was said: 'Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to by-laws and other regular remedies for the suppression of nuisances.'

"In such cases, prescription, whatever the length of time, has no application. Every day's continuance is a new offense, and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it. *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

"The legislature of Massachusetts, on the 1st of February, 1827, incorporated the 'Boston Beer Company,' 'for the purpose of manufacturing malt liquors in all their varieties in the City of Boston,' etc. By an act of June, 1869, the manufacture of

malt liquors to be sold in Massachusetts, and brewing and keeping them for sale, were prohibited, under penalties of fine and imprisonment and the forfeiture of the liquors to the Commonwealth. In *Beer Company v. The Commonwealth*, the Supreme Court of Massachusetts held that 'the act of 1869 does not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals.

" 'The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the legislature.'

" 'This court unanimously affirmed that judgment. In our opinion, Mr. Justice Bradley, speaking for the court, said: 'Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals.' The judgment here was placed also upon another ground. *Beer Company v. Massachusetts*, *supra*, p. 25.

" 'Perhaps the most striking application of the police power is in the destruction of building to prevent the spread of a conflagration. This right existed by the common law, and the owner was entitled to no compensation. 2 Kent. Com. 339, and notes 1 and a and b. In some of the States it is regulated by statute. *Russel v. The Mayor of New*

York, 2 Den. (N. Y.) 461; American Print Works v. Lawrence, 23 N. J. L. 590.

"In the case before us it does not appear that the factory could not be removed to some other place south of the designated line, where it could be operated, and where offal could be conveyed to it from the city by some other railroad, both without rightful objection. The company had the choice of any point within the designated limits. In that respect there is no restriction.

"The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future, by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and we think the charter did not give it to them.

"There is a class of nuisances designated 'legalized.' These are cases which rest for their sanction upon the intent of the law under which they are created, the paramount power of the legislature, the principle of 'the greatest good of the greatest number,' and the importance of the public benefit and convenience involved in their continuance. The topic is fully discussed in Wood on Nuisances, c. 23, p. 781. See also 4 White, Actions and Defences, 728. This case is not within that category. We need not, therefore, consider the subject in this opinion."

In North Chicago City Ry. Co. v. Lake View, 105 Ill. 207, the Town of Lake View enacted an ordinance prohibiting the railway company from using steam for the

purpose of propelling its cars along a certain street. It was claimed that the town had no authority to pass the ordinance prohibiting the use of steam for the purpose of propelling the company's cars, and that under the charter of the company it was authorized to use this motive power. While this case is not directly in point, yet the principle involved in the case at bar is there. In this case the court held that it was the intent of the legislature, in granting the charter, that the company should use horsepower instead of steam power to propel its cars. However, the opinion of the court proceeds upon the theory that in the exercise of the police power the city would have the right to prohibit the use of steam, if justified under all of the circumstances of the case, and says:

"As already conceded, there are many innoxious useful things which the municipal authorities of a town or city could not lawfully, under a general grant of power like the one in question, declare nuisances,—such, for instance, as the exercise of certain trades and callings, as, that of a physician, druggist, and the like. In all such cases as these, courts, acting upon their own experience and knowledge of human affairs, would say, as matter of law, the exercise of these trades or callings, or things of like character, are not nuisances, and that any attempt to so declare them by the municipal authorities would be an unwarranted abuse of their power. On the other hand, there are many things which courts, without proof, will, on the same principle, declare nuisances. Such, for instance, would be the digging of a pit, or the erection of a house, or other obstruction, in a public highway; and an ordinance passed by a town or city having, as in the present case, a general power over the subject,

declaring such obstructions nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance. And so we regard the use of steam, in the manner specified in the ordinance, for the purpose of propelling street cars along a public street in a thickly populated town, in the absence of any legislative grant authorizing it to be done. Such a use of steam, under the circumstances stated, is, per se, a nuisance.

“With respect to the remaining question little need be said. It is conceded the company’s charter authorizes it to maintain and operate a street railway along and over the street in question, and it is contended that, inasmuch as the charter is silent as to the character of the power to be used in propelling the company’s cars, the company has the option to use for that purpose either steam or horsepower, as it may prefer. We think, in such case it would be more reasonable to hold the legislature intended the company should use that kind of motive power in propelling its cars which would be most conducive to the best interests and safety of the public having occasion to use the street as a common highway, and which was then in ordinary use in this state. Giving the charter this construction, horse, and not steam, power was clearly intended.”

That is the contention in the case at bar, that the Council of the City of Portland, at the time of the enactment of Ordinance 599, had in mind that the city would grow, and that the use of steam would become obnox-

ious and, therefore, said ordinance is within the ruling of the Illinois case just above cited.

Buffalo & Niagara Falls Ry. Co. v. City of Buffalo,
5 Hill (N. Y.) 209, 211, the Court said:

"Looking also to the evil at which the amendment of the city charter was obviously aimed, we cannot doubt that the ordinance in question comes fairly within the provision of the act. We need no other proof of the fact that what may be derived from our own observation and the experience of the times, that a train of cars impelled by the force of steam power through a populous city, may expose the inhabitants, and all who resort thither for business or pleasure, to reasonable perils, so much so, that unless conducted with more than human watchfulness, the running of the cars may well be regarded as a public nuisance. It is most fit and proper, therefore, that they should be placed under the control and regulation of the city authorities, and that such authorities should possess a discretionary power to remove the danger by directing a change in the mode of impelling the train."

In **Brown v. City**, 47 Pa. 329, the Court said:

"In respect to the care, regulation, and control of the highways within its corporate limits, the City of Philadelphia exercises a portion of this power of the commonwealth subject only to the higher control of the state and the use of the public, and therefore a written license, granted by the City for a valuable consideration authorizing the holder to connect his property with the city railroad by a turnout and track, is not such a contract as will prevent the city from removing said railroad, when-

ever in the opinion of its authorities such an action will tend to the benefit of the public."

Mr. Elliott on Roads and Street, 3d Ed. Vol. 2, Section 839, approves of this case, and in Section 931, says:

"It is possible to conceive a case where changes made by the growth of a city might be so great as to make it impossible to employ steam as a motive power, without endangering the lives of those having a right to use the streets, and it seems to us that, in such a case, the municipal authorities might require the company to use some less dangerous motive power."

In *Municipal Paving Co. v. Donovan*, 142 S. W. 644, the City of Dallas, Texas, by ordinance, prohibited the use of any engines propelled by steam power over any street or highway of the City except those operated on a railway track. The Court of Civil Appeals of Texas sustained the ordinance as clearly within the police power of the city to enact.

The Illinois Court of Appeals in *City of Macomb v. Jones*, 158 Ill. App. 271, sustained a similar ordinance.

In *Hennington v. Georgia*, 163 U. S. 299, this court upheld a statute forbidding the running of freight trains on Sunday, as being a measure for the protection of the health and morals of the State, a police regulation.

In *Baltimore v. Baltimore Trust & Guarantee Co.*, 166 U. S. 673, this court sustained the municipal authorities of Baltimore in directing a street railroad company to maintain but one track through Lexington Street in-

stead of a double track as originally granted to the company, and held that it did not substantially change the terms of the contract, if there was one between the city and the railroad company, as expressed in the original grant, and was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of the street by the railroad company, and that the original contract, assuming but not deciding that one existed, was entered into subject to the right of the city to adopt such a regulation, and it must be borne in mind, in the case at bar, that the appellant at the time the case was tried in the lower court was constructing what is known as the Beaverton Cut-off. (See Transcript of Record, testimony of L. R. Fields, p. 98; testimony of J. P. O'Brien, Transcript of Record, p. 110.) Since this case has been tried such cut-off has been fully constructed and it is in operation by the appellant in error, and today it is not operating over Fourth Street any freight trains. While this fact is not in the record of this case, yet I think it will be admitted by the appellant that such is a fact, and that it is obeying the provisions of Ordinance No. 16491 so far as it is made applicable to the operation of freight cars. And it must be further borne in mind, that said ordinance, while it prohibits the use of steam locomotives on Fourth Street, does not, as is claimed by appellant, prohibit the running of its trains, or in any way interfere with the operation of its trains. There is no reason why it cannot use electricity for a motive power. There is no provision of law in force at this time in the City of Portland which in any manner will prevent the appellant from propelling its trains by electricity; therefore, it does not interfere with the operation of said

railroad, nor does such regulation affect any vested or contract rights. So far as the City of Portland is concerned, it has simply said to the appellant, you must not use locomotives along Fourth Street, with which to move your trains, but it has not said that it cannot use any other power. In other words, it has not attempted to prevent the running of trains on, along or over Fourth Street, but has simply legislated against the motive power used to move said trains. But if the appellant still insists that the Council had no authority to enact Ordinance No. 16491, so far as it affects freight cars, we still maintain that under Ordinance No. 599 there is no express stipulation therein that it shall be permitted to use freight cars thereon. The right granted was simply to construct a railroad track and run cars over the same and nothing whatsoever is said about the motive power or the character of the cars. But if this be not true, still, within the provisions of Ordinance No. 599, if the operation of freight cars becomes a nuisance, it may prohibit the running of the same on that particular street, under its police power, which was not contracted away, if the operation of such cars becomes dangerous and detrimental to the public safety. The court below said:

"At the time the city granted to the plaintiff's predecessors in interest authority or permission to occupy Fourth Street for railway purposes the street was an unimproved back street with scattering dwellings along it and no business houses. It is now practically in the heart of the business district and is one of the principal business streets of the city. It is frequented daily by a large number of persons, teams and vehicles constantly traveling

along and across the street during business hours. It is quite steep throughout the business district and the noise, vibration, smoke, cinders and soot from the moving steam locomotives and trains seriously interfere with the transaction of public and private business, and it is a constant source of danger and inconvenience to the public."

Suppose, that in the early history of the City of Washington a railroad company had been granted a franchise, or a right to locate its tracks, upon Pennsylvania Avenue and a further right to run, and operate freight cars thereover, propelled by steam locomotives, and the company claimed that right was in perpetuity, and today, along Pennsylvania Avenue, freight trains were being run propelled by steam locomotives, and the governmental authorities in Washington should decree, by lawful enactment that no locomotives, or freight cars, should be operated on said avenue, would your Honors hold that this was not a reasonable regulation? The foregoing is an apt illustration of the actual situation in the City of Portland.

And, as was said, by this court in *Baltimore v. Baltimore Trust Co.*, supra:

"It granted the use of the streets for double tracks for many miles, and the subsequent limitation of that use to one track related to but a few hundred feet where peculiar and exceptional conditions existed, where the danger to be apprehended from the use of electric cars on double tracks in a narrow and busy thoroughfare was very great, and where it might fairly be decided by the common council that double tracks at that point would be an unreasonable and dangerous use of the street

by the company and directly tend to prevent its reasonable and safe use and enjoyment by the public at large."

The evidence in this case discloses that street car lines cross the track of the appellant at four different places, viz., Glisan, Burnside, Washington and Morrison Streets; that at Fourth and Glisan there are 632 cars crossing per day; at Fourth and Burnside, 645; at Fourth and Washington, 1105, and at Fourth and Morrison, 552, making a total of 2934 street cars in eighteen hours (Transcript of Record, p. 411, testimony of F. Cooper), and it must be borne in mind that this testimony was taken on the 4th day of December, 1909 (three years ago), and the city has grown considerably since that time. This is only one phase of the traffic situation along Fourth Street, and does not take into consideration the number of pedestrians that cross and recross the tracks every day, nor the other moving traffic across the street; and as disclosed in the testimony of Mr. Cooper, when trains are passing, particularly freight trains, all of this traffic is stopped.

The language of Section 3, "That the common council reserves the right to make or to alter regulations at any time as may be deemed proper for the conduct of said road within the limits of the city," is broad and general in its term, and that reserved power is a continuing one, and so long as the object is plainly one of regulation, as said by this court in the Baltimore case, "it may be exercised as and whenever a common council may think proper; the use of the street may be subjected to one condition today and to another and addi-

tional one tomorrow, provided the power is exercised in good faith and the condition imposed is appropriated as a reasonable regulation, and is not imposed arbitrarily or capriciously."

The lower court found that the provisions of the Ordinance No. 16491 were not unreasonable or arbitrary. This conclusion was arrived at after hearing all of the testimony in the case.

Continuing this discussion as to whether or not the Council, by the enactment of Ordinance No. 599, could contract away its police power so as to prevent it from excluding locomotives and freight cars from Fourth Street will say that in the case of Portland Railway, Light and Power Company vs. The City of Portland, just decided by Judges Bean and Wolverton in the District Court of the United States for the District of Oregon, and not yet reported, the legislature of the State of Oregon, under the charters of 1898 and 1903 authorized the granting of franchises to street railway companies, and, in pursuance of this authority, franchises were granted to the said railway company.

Section 112 of the Charter of 1903 provided as follows:

"Every grant of a franchise which provides for the charging of rates, fares and charges shall contain a provision fixing the maximum rate of fares, rates and charges, which the grantee his, its or their successors or assigns can charge or collect for services rendered or performed by virtue of and during the life of such franchise and the operation of his or its plant or property thereunder; and said grant may also or in addition provide that the

Council reserve the right to thereafter from time to time change, alter, regulate and fix fares, rates or charges which the grantee his, its or their successors or assigns, can charge or collect thereunder during the life of such grant or franchise."

One of the franchises No. 19176 contains the following provision:

"Section 12: The Railway Company, its successors and assigns may charge and collect from each passenger traveling upon its railways or street railways for each trip traveled by such passenger in one general direction, wholly within the City of Portland, on the railways or street railways of the Railway Company, its successors and assigns, including railways and street railways constructed on the streets or parts thereof, authorized by Section 1 of this ordinance, a fare of five cents (5c) and no more, except that for passengers traveling in observation cars the railway company may charge and collect from each passenger a fare not exceeding fifty cents (50c) per trip. The Railway Company, its successors and assigns, may charge and collect for the use of funeral cars, mail cars, express cars, party cars and other special cars, a sum not exceeding ten dollars (\$10.00) per hour for each of such cars."

And that "this ordinance and the franchise herein contained is granted subject to all the terms, provisions and conditions contained in the charter of the City of Portland and applicable thereto in the same manner and to the same extent as if each and every said terms, provisions and conditions were expressly set out and incorporated herein." (Section 19.)

And also (the power and right at all times to reasonably regulate in the public interest the exercise of the rights and privileges granted by this franchise shall be and remain vested in the Council of the City of Portland)." (Section 21.)

At the time of the granting of such franchise, the following provisions of the City Charter were in force:

"The Council may, subject to the limitations and conditions contained in this charter, grant for a limited time specific franchises or rights in or to any of the public property or places mentioned in the preceding sections." (Streets, alleys, highways, etc.). "Every such grant shall specifically set forth and define the nature, extent and duration of the franchise or right thereby granted, and no franchise or right shall pass by implication. At all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the Council, and said power and right cannot be divested or granted." (Section 94.)

"The Council of the City of Portland shall have at all times power to regulate by ordinance, street railroads, tramways and other railroads and the use of tracks and cars, etc." (Section 105.)

"Every grant of a franchise which provides for the changing of rates, fares and charges shall contain a provision fixing the maximum rate of fares, rates and charges which the grantee, his, its or their successors or assigns can charge or collect for services rendered or performed by virtue of and during the life of such franchise and the operation of his or its plant or property thereunder; and said grant may also or in addition provide that the

Council reserve the right to thereafter from time to time, change, alter, regulate and fix fares, rates or charges which the grantee, his, its or their successors or assigns, can charge or collect thereunder during the life of such grant or franchise." (Section 112.)

Thereafter the City attempted to reduce the rate of fare and the company contended that such ordinance was violative of the contract between it and the city and that it was entitled to collect during the life of the franchise a fare of five cents and that in granting the franchise, the acceptance thereof became a vested right and that the city had no power or authority to fix or regulate fares that it might charge during the life of the franchise, namely, twenty-five years. In other words, the city had contracted with the street railway company that it might charge five cents during the life of the franchise and that the City thereby could not reduce the rate even though such reduction might be reasonable.

Judges Bean and Wolverton, in discussing this question, said:

"On the first branch of the case, the questions are (1) had the City of Portland at the time of the passage of Ordinance No. 19176 legislative authority to contract away for the * * * of the franchise the governmental right of fixing fares * * * (2) has it done so? If the first question is answered * * * the negative the other necessarily becomes immaterial, for if the city had no authority to grant the complainant immunity by contract from the right of the state, in the ex-

ercise of its governmental powers, to reasonably fix rates for the carriage of passengers over its line, this court should not assume to inquire whether the state has in fact delegated to the city the power to fix rates. *Mill v. Chicago*, 127 Fed. 731; *New Orleans v. Water Works*, 142 U. S. 79.)

“A large number of decisions have been cited and commented upon by counsel. They have all been carefully examined. It is needless to refer to them in detail for, as said by Mr. Justice Moody in *Telephone Company v. Los Angeles* (211 U. S. 273), ‘No case, unless it is identical in its facts, may serve as a controlling precedent for another.’ It is enough that the authorities are agreed that the right to reasonably regulate rates to be charged by public service corporations is a governmental power, continuing in its nature, and while it may be suspended in a given case by a contract for a definite time, not grossly unreasonable in point of time (*Detroit v. St. Ry.*, 184 U. S. 368; *Vicksburg v. Water Works*, 206 U. S. 496; *Los Angeles v. Water Co.*, 177 U. S. 558; *Minneapolis v. St. St. Ry.*, 215 U. S. 417; *Cleveland v. St. Ry.*, 194 U. S. 517; *Walla Walla v. Water Co.*, 172 U. S. 1) it can only be done by words of positive grant or language equivalent thereto, and then only by the supreme legislative body of the state, unless the authority to do so is clearly delegated by it to some governmental subdivision.

“‘The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for the purpose is required. This proposition,’ says the Court in *Telephone Company v. Los Angeles*, *supra*, ‘is sustained by all the decisions of this court.’

"It is further said in that case: 'For the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakeably appear, and all doubts must be resolved in favor of the continuance of the power.'

"Citing a large number of cases: It was consequently held that authority to a municipality to grant a franchise to the highest bidder after public advertisement, stating the character, terms and conditions of the franchise, 'to erect or lay telephone wires * * * upon any public street or highway' and 'to regulate telephone service and the use of telephones * * * to fix and determine the charges for telephones and telephone service and connections' conferred ample authority to exercise the governmental power of regulating charges but not 'authority to enter into a contract to abandon the governmental power itself' notwithstanding a franchise so sold by the city provided that the charge for services should not exceed specified amounts. All the leading decisions bearing on this subject are so thoroughly and carefully reviewed and the distinction between them pointed out by Mr. Justice Moody in the case just referred to that it is unnecessary to prolong this opinion by reference to them. The concrete question before us is whether the City of Portland had authority by its charter, at the time Ordinance No. 19176 was adopted, to contract with a public service corporation as to the fares such corporation might charge and collect during the life of the franchise, so as to deprive itself or the state from exercising during that time the governmental power of rate regulation. Our attention has been called to no express authority to do so. The position of the complain-

ant is that such authority is to be found in the general power to grant franchises for the use of the streets, and in Section 112 of the charter, declaring that every franchise so granted shall fix the maximum rates to be charged during the lifetime thereof. Neither of these provisions contain any express authority to the city to contract away the important governmental power of regulating rates. Authority given a city to grant franchises for the use of its streets may impliedly confer the power to provide therein, as a condition to the exercise of the grant, the rates which it may be lawful for the grantee to charge and collect (152 Mich. 654), but it does not authorize the city to barter or contract away the governmental power of thereafter changing such rates if the altered conditions of the country require. (*Water Co. v. Freeport*, 180 U. S. 587; *Ga. Rd. & Banking Co. v. Smith*, 128 U. S. 174; *Telephone Company v. Los Angeles*, *supra*.) In the *Freeport* case the City Council or Board had authority to provide for a supply of water 'by the construction and regulation of wells, pumps, cisterns, reservoirs or waterworks, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.' Under such authority the city granted by ordinance to one Shelton or his assigns, the exclusive right and privilege for the period of thirty years to supply the city and its inhabitants with water, providing therein the rates which the company might charge the city and consumers, and declaring that such ordinance should become a binding contract between the city and Shelton upon his filing an acceptance thereof, and thereafter it should not be altered, amended or changed in any way without the consent of both

parties. Shelton filed his acceptance of the terms and conditions of the ordinance. The city subsequently reduced the rates to be charged by the grantee, and its order was sustained by the Supreme Court on the ground that it had no authority to make an irrevocable contract fixing water rates for the life of the franchise, because such a power was not indispensable to the exercise of the other powers granted. The authority of the city in this case was, it seems to us, fully as complete as can be claimed for the authority of the City of Portland. Moreover, it is expressly declared in the section of the charter of the City of Portland authorizing it to grant, for a limited time, franchises or rights to the use of its streets by public service corporations that 'at all times the power and right reasonably to regulate in the public interest the exercise of the franchise or right so granted shall remain and be vested in the Council and said power and right cannot be divested or granted' and this provision is carried into the complainant's franchise by express words. Here is a positive provision of the charter and franchise that the right to reasonably regulate in the public interest the exercise of the rights granted cannot be and was not granted away. The word 'regulate' is a broad term. It is the word used in the Constitution of the United States to define the powers of Congress over Interstate Commerce, and it is hardly necessary to cite authorities to show that under such power Congress has the right to regulate the charges or rates for the transportation of freight or passengers by interstate carriers. Section 112 of the charter does not in terms or by necessary implication authorize or empower the city to enter into an irrevocable contract with the grantee of a franchise fixing the rates of fares which may be charged by such

grantee. Such a contract is not indispensable or necessary to the exercise of the other powers granted. Moreover, the section must, we think, be read in connection with the other provision in the charter reserving to the city the right and power at all times to reasonably regulate in the public interest the exercise of a franchise granted by it. It is in the nature of a command from the supreme legislative power of the state to the city that it shall, in granting franchises which provide for a charge of fares, insert a provision fixing the maximum charges which the grantee or its assigns may charge or collect for services rendered during the lifetime of the franchise. It is a limitation rather than the grant of a power to contract or barter away the governmental right of regulating fares, (*Home Tel. & Tel. Co. v. Los Angeles*. 155 Fed. 554-573) and the fact that no provision was entered in the franchise reserving to the city the right to change the rate cannot affect its power to do so.

"We conclude that the city had no authority at the time of the adoption of Ordinance No. 19176 to contract away the right of regulating the fares to be charged by the grantee when the public interest required, and therefore the ordinance complained of is not void as impairing the obligations of a contract."

Prohibition of steam power under Ordinance No. 16491 does not prevent appellant from employing electricity as a motive power.

Mr. Booth, in his work on Street Railways (2nd Ed.) Section 68, says:

"It was decided by the Supreme Court of Illinois

that a charter which was silent as to the motive power that might be used, conferred the right to use only that means of propulsion 'which would be most conducive to the best interests and safety of the public having occasion to use the street as a common highway, and which was then in ordinary use in the state.' In that case the city was sustained in prohibiting the use of steam. Since that decision was announced many radical and beneficial changes have been introduced in the mode of propelling cars, and in numerous instances one kind of power has been substituted for another without express legislative sanction for the use of the improved method. While it is undoubtedly true that the legislature, or, in the absence of a prohibitory statute, the local authorities, when such a regulation would not violate vested rights, may lawfully prohibit the use of any system deemed injurious to public interests, it does not follow that a municipality may not permit the adoption of an improved method in general use merely because, at the date of the existing charter, that system was not in common use in the state by which the charter was granted. And, if the statutes are silent on the subject, no good reason is apparent for denying the right of a company, with the consent of the city, to adopt a system which was discovered since the passage of the original ordinance by which its franchise was acquired. These views are believed to be in accord with the policy of municipal action both in the United States and Canada, and to find some support, by analogy at least, in the adjudicated cases. But in a case in New Jersey much seems to have depended on what the Court believed to have been 'within the legislative design' when the act in question was passed, the conclusion of the Court being that while, under the statute, the

council could lawfully permit the use of 'electric or mechanical motors,' it could not permit the use of poles and wires, because the legislature could not have had any knowledge of the use of such appliances."

Is Ordinance No. 599 a Franchise in Perpetuity?

A general statute such as Sections 6841 and 6842 granting a right to railroad companies to locate their tracks on the streets of a municipality is not a franchise in the true sense of that word, but a license. It is not a direct legislative grant of a franchise as contended by counsel. When an ordinance or statute granting a right on a public street does not attach any fixed term of years to its duration, divergent views have arisen as to the effect of the grant and the time during which it can continue. So far as we have been able to ascertain, no rule has been reached which has generally been accepted by the Courts as the true rule.

This Court in *St. Clair County Turnpike Co. v. Illinois*, 96 U. S. 63, affirming 82 Ill. 174, held that a franchise was limited to the duration of a corporate life.

In discussing this question, let it be borne in mind that the Oregon Central Railroad Company, the original grantee under Ordinance No. 599, has been dissolved. (Complaint, Abstract of Record, page 13.)

Where the fee of the street is not vested in the municipality, as is the rule in Oregon, (*Sharkey v. City of Portland*, 58 Or. 353), the view has been adopted in some jurisdictions making the duration of franchises

commensurate with the existence of the public easement, and terminating therewith upon the vacation of the street. This is the rule in Massachusetts. (*New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397.)

The Supreme Court of Illinois has, by a long line of decisions, placed a limitation upon the terms of franchises which might otherwise be perpetual. According to its view, if the municipalities had granted rights to public service corporations under certain restrictions and conditions to occupy the street with its structures and no time had been fixed when such rights should cease, the right does not exist in perpetuity, but only exists with the life of the franchise itself, and accordingly, where a city was merged with another municipality, an unlimited franchise was terminated, and these views were accepted and applied by this Court. (*Blair v. Chicago*, 201 U. S. 400.)

Another view is that when a grant is made to a corporation whose corporate term is limited and there is no express declaration of perpetuity in the grant or limitation therein, it holds only during the corporate life of the grantee, and this was the view adopted by this Court in the *St. Clair County Turnpike* case.

The Supreme Court of Oregon has never passed upon this question. It has, however, in *Parkhurst v. Capital City Railway Co.*, 23 Or. 471, held that unless a municipality had direct authority, it was not authorized to grant an exclusive franchise. It is conceded and admitted in this case that the City of Portland had no

delegated authority from the legislature to grant franchises.

In *Lake Roland Elev. R. Co. v. Baltimore*, 77 Md. 352, the Maryland Court of Appeals held that the consent to the use of the street by a railway company gives a mere license and not a franchise.

In *the City of Belleville v. Citizens' Horse R. Co.*, 152 Ill. 171, the Illinois Supreme Court also held that the consenting to the use of the street by a railway company was a mere license.

In *Baltimore Trust & Guarantee Co. v. Baltimore*, 64 Fed. 160, the decision of the Circuit Court of the United States in Maryland, but with a division of the Court, directly conflicted with that of the Maryland Court of Appeals, but this Court in *Baltimore v. Baltimore Trust & Guarantee Co.*, 166 U. S. 673, did not, in deciding that case, find it necessary to decide that point.

Mr. Elliott, in his work on *Roads and Streets* (3rd Ed. Vol. 2) Section 1048, says:

"Although a municipality may have power under its general authority over its streets, to grant a street railway company the right to use them, it does not necessarily follow that it has power to grant to any company a monopoly or a perpetual right to use them. In our opinion, the better rule is that its ordinary general powers over its streets will not authorize it to grant a monopoly or a perpetual right." And he cites in support of his text the following cases.

- Louisville City R. Co. v. Louisville, 8 Bush (Ky.) 415;
- Memphis City R. Co. v. Memphis, 4 Cold. Tenn. 406;
- Nash v. Lowry, 37 Minn. 261, 33 N. W. 787;
- Lake Rowland etc. R. Co. v. Mayor, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126;
- Eichels v. Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561;
- State v. Trenton, 36 N. J. L. 79;
- Birmingham etc., St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615;
- Montgomery Light etc. Co. v. Citizens' Light etc. Co., 142 Ala. 462, 38 So. 1026;
- Davis v. Mayor, 14 N. Y. 506, 67 Am. Dec. 186n;
- Milhan v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314;
- Denver etc. R. Co. v. Denver City R. Co., 2 Colo. 673;
- City of Boston v. Richardson, 13 Allen (Mass.) 146, 161

See also,

- Detroit Citizens' St. R. Co. v. City of Detroit, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667, 1 Am. & Eng. R. Cas. (N. S.) 71;
- Altgelt v. City of San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383n;
- Mayor of Houston v. Houston etc. R. Co., 83 Tex. 548, 19 S. W. 127, 29 Am. St. 678;
- New Orleans etc. R. Co. v. City of New Orleans, 44 La. Ann. 748, 11 So. 77;

Parkhurst v. Capital City R. Co., 23 Ore. 471,
32 Pac. 304, 7 Lewis' Am. Corp. & R. Rep.
562, 26 Am. L. Rev. 675;

New Orleans etc. R. Co. v. New Orleans, 44 La.
Ann. 728, 11 So. 78.

The Supreme Court of Oregon, in *McQuaid v. Portland & V. Ry. Co.* supra, regarded the occupation of a public highway by a railroad company, under the appropriation authorized by the statute in question (§§6841, 6842, L. O. L.), as nothing more than "a kind of sufferance." That the railway corporation is permitted by the statute to appropriate only so much of the highway as may be necessary or convenient; but the use thereof by the public is not abridged, and further says:

"Its occupation of the street is the same as of any other beneficiary of its use, and is subordinate to the authority of those in whom the law vests the management and control of the street."

The Supreme Court of Oregon in *C. & G. Road Co. v. Stevenson*, proceeds upon the theory that the occupancy of a street, or of a county highway, under the provisions of that statute, amounts to nothing more than a mere contract as distinguished from a franchise, and in view of the fact that the City of Portland agreed with the Oregon Central Railroad Company upon the terms of occupancy, but did not agree upon the length of time the contract should run, can it continue only so long as both parties are consenting thereto? Do the facts in this case bring it within the principles announced in *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33,

where it was held that where a railroad company was given the right to occupy a street without any provision as to time, its right to continue the use of the street was terminable at the election of either party and where the Court said:

"Did the granting of this privilege or right and its acceptance constitute an agreement by the gas company that, having entered the city, it should remain there forever if the city should not permit it to withdraw? The logic of the defendant in error would seem to support an affirmative answer to this question. But if the company enters by virtue of the contract and can withdraw only by consent of the city, then the contract lacks mutuality; for we can discover no corresponding stipulation in favor of the company. It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; and we feel quite sure that even the defendant in error, on more mature reflection, would not insist upon such a conclusion. The Court laid it down as the law, in *Wabash R. Co. v. Defiance*, 52 Ohio St. 262, 307, 40 N. E. 89, that: 'Every grant in derogation of the right of the public in the free and unobstructed use of (53) the streets, or restriction of the control of the proper agencies of the municipal body over them or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to

give effect to the grant.' The doctrine, as well as the judgment, in this case was affirmed in *Wabaah R. Co. v. Defiance*, 167 U. S. 88, 17 S. Ct. 748, 42 U. S. (L. Ed.) 87. The same rule of construction was approved and followed in *Blair v. Chicago*, 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. Ed.) 801, and in *Cleveland, etc. R. Co.* 204 U. S. 116, 27 S. Ct. 202, 51 U. S. (L. Ed.) 399. It comes then to this, that in the absence of limitations as to time, the termination of the franchise is indefinite and to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto."

To the same point see *State v. Atl. & N. C. R. Co.*, 53 N. E. 290. It is admitted in this case that the City of Portland at the time of the passage of Ordinance No. 599 had no express authority given it to grant franchises for the construction or operation of railroads on its streets, and we take it to be elementary that in the absence of an express power in the charter of a city, to grant an exclusive franchise or a franchise in perpetuity, it has no such right. Mr. Dillon, in his work on *Corporations* (5th Ed.) Vol. III, Sec. 1265, discusses at length this question, and says:

"No rule has yet been reached which is generally accepted by the Courts."

And as said by Mr. Justice Moody in *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 273:

"No case, unless it is identical in its facts, may serve as a controlling precedent for another."

The Supreme Court of Oregon in the *City of Joseph v. Joseph Water Works Company*, 57 Ore. 586, had be-

fore it this question: The City of Joseph granted to the Joseph Water Works Company the exclusive right and privilege to lay water mains and to supply that town and its inhabitants with water. The ordinance granting this right, however, limited the term of the grant to fifteen years, which expired January 1, 1909. The company, however, continued its water system and on April 12, 1910, commenced to extend its mains in streets not before supplied with water. The city commenced an action to enjoin on the ground that the company had no franchise. The company contended that it had a perpetual franchise, notwithstanding the limitation of fifteen years expressed therein and in discussing this question, the Court said:

"A municipality cannot, at least without statutory authority, grant a perpetual utility franchise. It is said in *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234, 241 (91 N. W. 1081, 1084), that 'grants or franchises in perpetuity or for unreasonably long periods of time are generally regarded as against public policy, and, if ever valid, the authority therefor must be found in the constitution or statutes of the state.' See also,

28 Cyc. 655, 875;

Cooley's Const. L. (6th Ed.) 251;

Citizens' St. Ry. Co. v. Detroit Railway, 171 U. S. 48 (18 Sup. Ct. 732; 43 L. Ed. 67);

Brenham v. Water Co., 67 Tex. 542 (4 S. W. 143);

Illinois Trust & Savings Bank v. Arkansas City Water Co. (C. C.) 67 Fed. 196;

Logansport Ry. Co. v. City of Logansport (C. C.) 114 Fed. 688.

"It is said in *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co.* 79 Ala. 472 (58 Am. Rep. 615):

'Judge Cooley adopts the view that a municipal corporation cannot, 'without explicit legislative consent,' permit the construction of a street railway in its streets, and confer on the projectors 'privileges exclusive in their character, and designed to be perpetual in duration.' * * * No reason is perceived why this principle is not entirely sound, and in strict conformity to every rule pertaining to the true functions of municipal corporations. * * * They have no implied power to barter away today, as a monopoly to one, that which, the public necessities of a growing city may require to be reserved, in order that it may be exercised for the public benefit on tomorrow.'

"See also, note to *Huron Waterworks Co. v. City of Huron* (S. D.), 12 Am. R. R. & Corp. Rep. 398; *Westminster Water Co. v. Westminster* (Md.), 64 L. R. A. 630. Thus we see that the town was powerless to grant a perpetual franchise, and it cannot be presumed that it intended to do so. * * * It is a rule of construction that, if the terms of the franchise are doubtful, they are to be construed strictly against the grantee and liberally in favor of the public. What is not unequivocally granted is withheld, and nothing passes by implication, except what is necessary to carry into effect the obvious intent of the grant. 19 Cyc. 1559; Joyce, *Franchises*, Sec 23; *Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385 (28 Sup. Ct. 135; 52 L. Ed. 257); *Birmingham*

Pratt Mines St. Ry. Co. v. Birmingham St. Ry Co.,
79 Ala. 465 (58 Am. Rep. 615).

"The Dartmouth College case (4 Wheat. 518; 4 L. Ed. 629), cited by defendant, is not in point for the reason that it relates to a franchise created by sovereign power. And we hold that Section 4 fixes the duration of the franchise at fifteen years. If, as defendant contends, the duration of the franchise in terms is perpetual, then, as we have seen, it is void, and is no protection to defendant for the acts complained of here. This was expressly held in *Westminster Water Co. v. Westminster*, 98 Md., 551 (56 Atl. 990; 103 Am. St. Rep. 424), where the contract was unlimited as to time. The Court held that it was a contract in perpetuity, and therefore void; and that the Court cannot make a new contract between the parties for a limited period: *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 241 (91 N. W. 1081); *Logansport Ry. Co. v. City of Logansport* (C. C.) 114 Fed. 688. A contract which is beyond the power of the city to make is void: *State ex rel v. Minnesota T. Ry. Co.*, 80 Minn. 108 (83 N. W. 32; 50 L. R. A. 656); *Flynn v. Little Falls Electric Water Co.*, 74 Minn. 180 (77 N. W. 38; 78 N. W. 106); *Milhau v. Sharp*, 27 N. Y. 611 (84 Am. Dec. 314)."

In *Logansport Ry. Co. v. City of Logansport*, 114 Fed. 688, the City of Logansport granted to the Logansport Railway Company the right to operate, in that city, a street railway. The ordinance contained this provision:

"That consent, permission and authority be and are hereby given, granted and hereby vested in said Logansport Railway Company, its successors and

assigns, to operate by electricity its cars, carriages and vehicles of any kind and character along, through, on, over and across the streets, and alleys, bridges and highways in the said City of Logansport now existing or that may be hereafter established or constructed as it may from time to time elect, in perpetuity."

The Court, in construing this ordinance, said:

"We are not concerned with the question whether or not the legislature possesses the constitutional power to grant to the cities of this state the authority to confer upon street railway companies the exclusive and perpetual use of such streets of the city as they may from time to time elect to use and occupy. The question in hand is, has the legislature conferred upon the City of Logansport any such power? The fee of the streets in cities in this state resides in the abutting lot owners, and the city possesses only an easement of way in the streets. It does not hold title to the easement as a private property right, which it may alienate at pleasure, as it might alienate property belonging to the city by title unimpressed with a trust. The city holds the easement in the streets in trust not simply for the city alone, but for the benefit and use of all the people of the state. In interpreting the statutes, the Court ought never to lose sight of the fact that in dealing with the use of the streets the common council of a city is acting as a trustee for the benefit and advantage of the public.

"It is manifest from a reading of the above-mentioned statutory provisions that the legislature has not conferred, in explicit and express words, on the City of Logansport, the power to grant to a street railway company either an exclusive or a perpetual

use of its streets for railway purposes. The act of 1861 simply provides that the street railway company shall first obtain the consent of such common council to the location, survey, and construction of its railroad, before the construction of the same shall be commenced. No words of perpetuity are expressly employed. The same is true of the act of 1891. There being no express words of perpetuity in the legislative grant, is such power necessarily to be implied from the language employed? In *Detroit Citizens' St. R. Co. v. Detroit Ry.*, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67, the question for decision was whether the legislature of Michigan had conferred power on the City of Detroit to grant to a street railway company the exclusive use of its streets. The statute provided that:

'All companies or corporations formed for such purposes (the railway purposes mentioned in the act) shall have exclusive right to use and operate any railways constructed, owned or held by them: provided that no company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe.'

The Court says:

'It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes.'

"And so it must be held here that similar and no broader language employed in the acts of 1861

and 1891 above mentioned does not explicitly and directly confer the power on the common council of the City of Logansport to grant either an exclusive or a perpetual privilege to occupy its streets for railway purposes. The Court further says:

‘There were many reasons which urged to this; reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust—and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges.’

“And how much stronger are the reasons which insistently forbid that the future should be committed and bound in perpetuity by the conditions of the present time, and that functions delegated for public purposes should be forever paralyzed in their exercise? That such powers must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly established.

“The power to grant the use of its streets in perpetuity not having been granted to the City of Logansport in explicit and express words, is it granted by a necessary implication? The Supreme Court, in the above cited case, further says:

“‘Mr. Justice Jackson, in *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.* (C. C.) 33 Fed. 659, says * * * ‘that municipal corporations possess and can exercise only such powers as are granted in express words or those necessarily or fairly implied, in or incident to the

powers expressly conferred, or those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable.’ The italics are his. This would make ‘necessarily implied’ mean inevitably implied. The Court of Appeals of the Sixth Circuit, by Circuit Judge Lurton, adopts Lord Hardwicke’s explanation, quoted by Lord Eldon in *Wilkinson v. Adam*, 1 Ves. & B. 422, 466, that ‘a necessary implication means not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.’ If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark, or, if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough—would have been natural under any constitution not prohibiting it—and the power to prescribe the terms and regulations of the occupation derive very little, if any breadth, from the expression of it.’

“But assuming that the power ‘to give consent upon such terms and conditions as the common council may see fit,’ found in the act of 1891, does acquire breadth from such expression, surely there is sufficient range for its exercise without extending it so as to embrace the power to grant the use of the streets in perpetuity.”

The Supreme Court, further on, says:

“‘Easements in the public streets for a limited time are different, and have different consequences,

from those given in perpetuity. Those reserved from monopoly are different, and have different consequences, from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.'

"Can it be successfully contended that the perpetual use of the streets of a city is indispensable to their use for railway purposes? * * * But the grant is open to a more serious objection. It was ultra vires of the common council to surrender its control of the streets of the city in perpetuity to the complainant. The municipal authorities had no power to grant forever to the complainant the right, at its own uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect. The right to determine for itself from time to time what streets could be used and occupied for street railway purposes consistently with the public safety and welfare is a power incapable of absolute alienation by the common council. By these ordinances the common council has undertaken to surrender this power, and to remit it to the uncontrolled election of the complainant. The only power reserved is the power, if the common council wishes the railway to be extended along a particular street, to notify the complainant of such desire; and, if it fails within one year to construct and operate its road on such street, then the use of such street may be granted to another railway company. But no right or power is reserved to prevent the railway company, at its election, from using with a double or single track any and all the streets of the city, however

injurious it may be to the public convenience, safety, or welfare. The public convenience, safety, and welfare, in this regard, are surrendered to the complainant. By these ordinances, if valid, to the complainant's election is relegated the question whether or not a street can, with due regard to the comfort and safety of the people, be occupied by a single or a double track railway. Such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to its charge, to be administered in the interest of the public, and not for the private advantage and gain of railway or other corporations."

Counsel for plaintiff in error will rely most strongly upon the recent decision of this Court in *Louisville v. Cumberland Telegraph & Tel. Co.*, 203 U. S. 571. We believe a distinction can be drawn between that case and the case at bar. In the *Louisville* case the telephone company received a franchise direct from the legislature and one of the conditions of the franchise was that it might occupy such streets in the City of Louisville as it desired with the consent of the general council of that city, and the council thereafter, by ordinance, designated certain streets that said company could use, and later on it attempted to repeal the rights of said company. In the case at bar the plaintiff in error has no franchise from the State of Oregon, but simply located its road under a general law which required it to agree with the City of Portland upon the terms and conditions of occupancy. An agreement was made between the company and the city as to the terms of occupancy, with the single exception, however, that

no agreement was made as to how long this right of occupancy should continue, that is, no time was fixed in the agreement and therefore the Louisville case does not apply because in that case the legislature unquestionably had a right to grant a franchise in perpetuity, but in the case at bar the legislature has not granted to the plaintiff in error a perpetual franchise on the streets of the City of Portland, nor any franchise at all, but simply authorized it to construct its tracks upon such streets as the city might designate, nor had the legislature at that time granted to the City of Portland any authority to grant a franchise, nor did it ever grant unto said city authority to grant franchises in perpetuity. The only authority that the legislature did grant was that a railroad company desiring to use any of the streets of a municipal corporation could enter into an agreement with that municipality as to the terms and conditions of occupancy, and it granted the further right to the municipality to make such agreement with the railroad company. Nothing, however, is said in the statute which can, by any method of construction, be held to authorize a municipality to enter into a contract with the railroad company giving it a perpetual right upon any of its streets.

As we view it, the case at bar is easily distinguished from the Louisville case. In the Louisville case the city attempted to take away from the company all of its property. It was not a regulating ordinance in any sense of the word, and if its action had been upheld it would have destroyed the entire business of the company. In the case at bar no such facts exist.

In the Louisville case, as said by this Court, "in considering the duration of such franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures," but in the case at bar no reason exists for such a holding, because the appellant can operate its road to the City of Portland. Its railroad is not confiscated as would have been the telephone company's property.

We can conclude the discussion of this phase of the case in the words of Chief Justice Hale, who says:

"Time is the wisest thing under Heaven. It is most certain that time and long experience is much more ingenious, subtle and judicious, than all the wisest and acutest wits, coexisting in the world, can be. It discovers such varieties of emergencies and cases and such inconvenience in things that no man would otherwise have imagined." (Hargraves Law Tracts.)

And in the words of Judge Dillon:

"The value of our system of law, as we now have it, is that it embodies the wisdom of time and experience. It is, perhaps, not too much to say that not until it was sought to use public streets, not only for surface railroads but for elevated and underground railways and other modern uses, did the exact nature of these respective rights come to be thoroughly considered. Good fruit in the law, as in the natural world, is the product alone of patient cultivation. It ripens slowly and can be gathered only at the appointed time. The exact state of the law on this subject in any given state can only be understood by a critical study of its special

constitutional and legislative provisions and line of judicial decisions." (Dillon Mun. Cor. Vol. III, page 20-87.)

It was not until 1898 that the legislature of the State of Oregon attempted to confer upon the City of Portland the express power to grant franchises in its streets to public service corporations. The growth of the State and the cities therein then began, and as a natural consequence, it became apparent that the future would not warrant either the legislature or its agency, the municipality, to grant franchises to these corporations, in perpetuity; that such a course would be detrimental to the interests of the public and it was not until 1903 that a limitation of twenty-five years was provided. It is safe to say that the Council of the City of Portland at the time it enacted Ordinance No. 599 (forty-three years ago), did not have in mind this question. If they had, is it not reasonable to suppose that they would have provided some limitation? Is it reasonable to suppose that those men acting at that time in the best interest of their constituents, the public, would not have provided for some limitation if they could by any possible human intelligence have looked into the future and seen the condition of Fourth Street as it is today? It is evident that they did have in mind, however, that the time would come when it might be dangerous to operate steam locomotives and freight cars over the street, and they provided for such contingency. But is it reasonable to suppose that these men wanted to grant a perpetual franchise in that street to this railroad company? We think not, especially in view of the later legislation upon this subject, that of limiting franchises to twenty-

five years, and providing that the city could take the same over at the expiration thereof and providing for compensation for the use thereof.

But if it should be held that the rights of the appellant, on Fourth Street, are in the nature of a perpetual franchise, can it be said that it has a franchise to perpetually operate freight cars along said street by steam power? Is Ordinance No. 599 construed with Sections 6841 and 6842 (Lord's Ore. Laws), susceptible of such interpretation? Could the Legislature of the State of Oregon perpetually contract its right away to prohibit the operation of a railroad when it became in fact a nuisance? We think not.

INTERFERENCE WITH INTERSTATE COMMERCE.

Appellant contends that Ordinance No. 16491 is void because it interferes with interstate commerce; but we understand the rule to be that the Courts will enforce all lawful and constitutional regulations and rules intended to safeguard the public by the proper control of corporations, and that each state has the power, never surrendered to the Government of the Union, to guard and promote the public interests, with regard to the police regulations, that do not violate the constitution of the United States, or the constitution of the state, and that all rights are held subject to the police power of the state; and if the public safety or the public morals require the discontinuance of any manufacture or traffic the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience. And the fact that a cor-

poration is engaged in interstate commerce does not deprive the state of power to exercise reasonable control over its business done wholly within the state. This principle is most elaborately enunciated by this Court in *Smith v. Ala.*, 124 U. S. 465, and local municipal regulation, such as the one now under consideration, is not an interference with interstate commerce. This road does not run outside of the State of Oregon, but is confined wholly within its limits.

The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances subject to the supervision of the Courts. The presumption, however, is always in favor of the validity of the action of the municipality, and no ordinance will be set aside if the evidence discloses that it was not enacted arbitrarily and not in the exercise of a reasonable discussion.

Mr. McQuillin, in his new work on *Municipal Corporations*, Vol. II, Sections 731 and 732, says:

"The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances, and hence the legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence. Thus, while an ordinance requiring street railways to run not less than one car every twenty minutes, between certain hours, will be presumed to be reasonable, it may be avoided by proving that the convenience of passengers does not require the running of cars as

specified. In questions of doubt, the Courts are inclined to defer to the discretion and judgment of the municipal authorities.

"The language of the cases is that 'when municipal authorities have adopted an ordinance, before a Court is justified in holding the same to be invalid the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property must be clearly made to appear. It should be manifest that the discretion interposed by the municipal authorities has been abused;' and that 'to arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city which would be absurd in the country.'

"Accordingly, in determining the question, the Court will have to regard all the circumstances of the particular city or corporation, the object sought to be obtained, and the necessity which exists for the ordinance. Implied power springs from necessity. That which may be necessary for a large city, may not be necessary for a small city or borough. That which is not necessary cannot be implied.

"Likewise, a reasonable regulation, intended to operate in a densely populated part of a city, might be unreasonable as applied to parts of the same city sparsely populated. Therefore all of the surrounding conditions must be carefully considered. It is thus manifest that, as a rule, the municipal authorities are more competent to pass on such questions than judicial tribunals. In recognition of this fact, the rule is of universal application that a clear case should be made out to authorize the Court to interfere with the exercise of the police powers of a

municipal corporation on the ground of unreasonableness.

“If there is no substantial connection between the assumed purpose of an ordinance and the end to be accomplished, it is unenforceable. So to be reasonable, the ordinance must tend in some degree to the accomplishment of the object for which the corporation was created and its powers conferred.

“In viewing its reasonableness the ordinance must be judged by its purport and effect, and not by the motives or intentions of individual law-makers who participated in its enactment. The rule usually applied is that ‘Courts will not look into the motives of a legislative body in the exercise of its legislative powers, except in extraordinary cases where public policy imperatively demands it on the ground of palpable fraud.’ ”

In *Union Oil Co. v. City of Portland*, 198 Fed. 441, the City of Portland enacted an ordinance restricting the location of oil tanks within certain districts. After such ordinance had been enforced a very short time it was repealed, but in the interim the plaintiff, the Union Oil Company, purchased property, and secured a permit from the city authorities to construct an oil plant in conformity with the provisions of the ordinance. Thereafter the council repealed the first ordinance and enacted another ordinance, the effect of which was to prevent the Union Oil Company from constructing its tanks upon land it had bought for that purpose. A suit was commenced in the Federal Court and it was contended that the last ordinance deprived said company of its property without due process of law, and that council

acted arbitrarily in enacting the later ordinance. The Court said:

“By its charter the city is given authority to regulate or prohibit the storage, manufacture or sale of oil within the city limits. Section 73, subd. 36. The storage of fuel oil and its products is therefore within the police power of the city, and a proper subject for municipal regulation or prohibition. The determination of the city as to what is a proper exercise of its powers in this respect is, of course, not final or conclusive, but is subject to the supervision of the Courts and will be disregarded when there has been an arbitrary and unwarranted interference with constitutional rights. *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169. The presumption, however, is in favor of the validity of the action of the council. The only question the Courts will consider is whether the means adopted are reasonably adequate to the accomplishment of the purpose, or whether the police power has been used for the protection of the public, or for the mere spoliation and destruction of private property and rights; in short, whether the municipal authorities, under the guise of protecting the public interests, have arbitrarily interfered with private business, or imposed undue or unnecessary restrictions upon lawful occupations. As said by Mr. Justice Brown in *Holden v. Hardy*, 169 U. S. 366-398, 18 Sup. Ct. 383 (42 L. Ed. 780):

“ ‘The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class.’ ”

Now, the evidence in this case does not show that the

council, in repealing the districting ordinance, acted arbitrarily and not in the exercise of a reasonable discretion. On a reconsideration, it found that the ordinance was adopted without full information as to the facts, and that it was a mistake, and hence corrected the error by repealing it. The contemplated construction of complainant's plant was no doubt the immediate cause of repeal; but it was not done to oppress or discriminate against the complainant, but for what the council deemed the public welfare. By the passage of the ordinance the council did not exhaust or bargain away the police powers of the city or deprive itself of the right to repeal such ordinance if, in its judgment, the public interest required. Nor was it estopped from doing so because the complainant had taken up an option previously acquired and expended money in making preparations for the erection of its plant within the territory described therein. The right to exercise the police power is a continuing one, and private property and business is always subject to a legal exercise thereof. *Portland v. Cook*, 48 Or. 550, 87 Pac. 772, 9 L. R. A. (N. S.) 733; *City of Portland v. Meyer*, 32 Or. 368, 52 Pac. 21, 67 Am. St. Rep. 538.

REVIEW OF EVIDENCE.

At the time of the enactment of Ordinance No. 599, January 6, 1869, the testimony in this case discloses that the population of the City of Portland was 7980. The population of the City of Portland according to the last official census was 208,000, but today it may be safely said to be 250,000.

Mr. Himes, a witness for the defendant in error in said case, and holding the position of Assistant Secretary to the Oregon Historical Society, testified that he had lived in Portland since March 13, 1864. That the condition of Fourth Street in 1869 was such that only wooden buildings were erected on the street; that the street was sparsely built up, no business buildings whatsoever on the street; that it was an earth street; no sewers and no water mains except wooden pipes. That he was twenty years of age at that time. That he remembered the first type of trains and engines that run over the road. That they were very small; that trains only ran occasionally; that there was only one train running back and forth in a day; that Fourth Street was away from the thickly settled part of the City; that the character and amount of travel on Fourth Street at that time was small; that it was impossible to haul heavy loads over it as there was no pavement. That the sidewalk consisted of two boards running length wise. That today, he has an office in the present City Hall; that the vibration from the trains that now operate on Fourth Street is felt; the jar is very distinct. That his office is some fifty feet back from the street; that the noise from the operation of the trains is annoying and it is difficult at times to carry on a conversation when the train passes.

That the City Council was justified in enacting Ordinance No. 16491 is borne out by the testimony of John B. Cleland, who testified, substantially, that he was a judge of the Circuit Court since January, 1898, holding court in the Court House, facing Fourth Street, constantly in various Court rooms; that the effect of the

passage of locomotives and freight cars along Fourth Street was to suspend hearings in the Court room during such passage; this occurred two or three times in the morning and two or three times in the afternoon.

(Transcript of Record, page 393.)

Mr. Barbur, Auditor of the City of Portland, substantially testified that since July, 1907, he had been Auditor; that he was personally present at meetings in the Council Chamber in the City Hall, which faces Fourth Street; that all business was suspended during the passage of trains; that there was considerable vibration felt in the City Hall when trains passed.

(Transcript of Record, page 395.)

Mr. Kruse, proprietor of a large hotel facing Fourth Street, substantially testified that the effect of the operation of steam locomotives, on his business, was to suspend business; telephones could not be used by guests on account of the rumbling noise from the train; that considerable dust and cinders and a great deal of smoke came in the hotel; that in the public dining room transoms had to be closed.

(Transcript of Record, page 396.)

Ben Selling, a merchant having a large place of business on Fourth Street, substantially testified that he was State Senator for Oregon—lived there forty years; that the effect of the operation of steam locomotives and freight cars was that the building shook, smoke caused inconvenience and the noise made it difficult to carry on conversation with customers; that jar from trains

caused a great many electric lights to be broken in his store.

(Transcript of Record, page 400.)

Mr. Henry, owner of a large office building facing Fourth Street, testified, substantially, that he had lived in Portland twenty years; that the effect of the operation of trains on said street was that many people objected to becoming tenants in his building on account of said railroad; that property is less valuable on Fourth Street on account of the operation of steam locomotives and freight cars on said street; that property was from ten to twenty per cent. higher on other streets; that all business and telephone conversations are suspended during the passage of trains.

(Transcript of Record, page 403.)

Father I. M. Vasta, pastor of the Italian Church, testified, substantially, that the church is located on said street; that services are constantly interrupted by the passage of trains—impossible to hear what is said; that it is a source of annoyance to children going to St. Mary's Academy, also located on said street; that the building shakes, and that the smoke dirties the building.

(Transcript of Record, page 414.)

Mr. D. T. Hunt, a resident on the street, testified that the vibration of the train affects his residence to such an extent that gas fixtures are loosened, and that gas mantels are destroyed.

(Transcript of Record, page 416.)

Mr. R. M. Gray, who operates a large store facing on

said street, testified that he had been in business on the street five years; that during the passage of the trains on Fourth Street it was impossible to use the telephone; that they have in connection with their business a ladies' department; that there are a great many telephone calls coming into that department, and that it is absolutely impossible to use the telephone during the passage of trains; that store is equipped with expensive lighting arrangement—has 200 Tungsten lamps, and that these lamps are constantly breaking; that the jar from the operation of trains on the street is the cause of this breakage; that the breakage costs him about Twenty-five Dollars a month; that the noise is such that it is difficult to carry on a conversation; that the operation of the train interferes with the proper transaction of business with customers; that all of the big freight trains frequently have two engines on both ends, and that there are several trains a day.

(Transcript of Record, page 347.)

Harvey O'Bryan, an insurance agent in the City, testified as follows:

"Q. Mr. O'Bryan, how long have you lived in Portland?

A. 22 years.

Q. What is your business?

A. Insurance.

Q. How long have you been in that business?

A. Sixteen years.

Q. Fire insurance?

A. Yes, fire insurance.

Q. I will ask you, Mr. O'Bryan, whether you have examined and whether you are acquainted with the buildings on Fourth Street from its northern extension up through the City of Portland.

A. Yes, I am quite familiar with them, having insurance on almost all of them, scattered along, and from making inspections at various times.

Q. I will ask you whether you made any special investigation before this trial.

A. Yes, I have maps which I have checked over and made a rough key of the blocks, and have inspected the buildings to verify the same.

Q. Have you made a list of the buildings and the dimensions?

A. Yes.

Q. Who they are occupied by?

A. Yes, sir.

Q. And the character of the business on Fourth Street?

A. Yes, sir.

Q. Have you that with you?

A. Yes, sir.

(The following was accepted as the direct examination of Mr. O'Bryan.)

Between Terminal Yard and Glisan Street.**West Side:**

Three and 2-story frame building, 100x100 feet, occupied by Wadhams & Kerr Brothers' Wholesale Grocery House.

Between Hoyt and Glisan Streets.**West Side:**

Four-story brick, 200x100 feet, occupied by the Union Meat Company.

East Side:

One and 3-story frame buildings, adjoining and communicating, 200 feet x 75 and 100 feet; occupied as machinery plant, warehouse and laundry.

Between Glisan and Flanders Streets.**West Side:**

At the Southwest corner of Fourth and Glisan Streets, a 3-story brick, 50x100 feet, occupied by the Pacific Coast Construction Company warehouse.

Northwest corner of Fourth and Flanders Streets, 3-story brick, Chinese occupancy, 200x100 feet.

East Side:

Southeast corner of Glisan and Fourth Streets, two brick buildings, One 3-story, 50x50, occupied———; 2-story buildings, occupied as candy factory and soap factory, building 50x100 feet.

Northeast corner of Glisan and Flanders Streets, one

and 2-story brick and frame building, occupied by Ben Trenkman & Co., sheet iron works.

Between Flanders and Everett Streets.

West Side:

Three-story brick, 200x100 feet, all Chinese occupancy.

East Side:

Northeast corner of Fourth and Everett Streets, frame building 50x100 feet, saloon and lodgings. From Flanders Street South 150 feet are four 1 and 2-story frame buildings, occupied by saloon and lodgings.

Between Everett and Davis Streets.

West Side:

Southwest corner of Everett and Fourth Streets, 100 x100 feet, seven 1 and 2-story frame buildings, occupied as saloons and lodgings.

Northwest corner of Fourth and Davis Streets, 3-story brick, 100x100, occupied as general storage.

East Side:

Between Everett Street and Davis Street are four 2-story frame buildings, average size of 50x75 feet, occupied as saloons, stores and lodgings.

Between Davis and Couch Streets.

West Side:

In this block are 200 feet by an average of 100 feet in depth of 2 and 1-story frame buildings occupied as

saloons, Japanese stores, and blacksmith and cabinet shops.

East Side:

Southeast corner of Fourth and Davis Streets, 3-story frame building running 200 feet East and West, and 100 feet North and South; stores, saloons, restaurants, etc., on ground floor, lodgings in second and third floors. Building known as Paris House.

On Northeast corner of Fourth and Couch Streets are various frame buildings, one to 2-story in height, all occupying 100x100, with stores, saloons, Chinese and Japanese as tenants.

Between Couch and Burnside Streets.

West Side:

On Southwest corner of Couch and Fourth Streets is the Overland Hotel, 4-stories, 100x100 feet. On the Northwest corner of Fourth and Burnside, is a 3-story concrete hotel building, with stores on first floor, running 200 feet East and West and fifty feet North and South,

East Side:

On the Southwest corner of Couch and Fourth Streets is a two-story brick building, known as Strayer Machine, 50x100 feet.

On the Northeast corner of Fourth and Burnside Streets, covering an area of 100x100 feet, are various buildings, two and one stories high, occupied as saloons, lodgings above, Japanese and Chinese stores.

Between Burnside and Ankeny Streets.

West Side:

On the Southwest corner of Fourth and Burnside Streets is a 2-story brick, 50x100 feet, known as the Men's Resort.

On the Northwest corner of Fourth and Ankeny is 7-story brick building, 100x100 feet, occupied by the Pacific Paper Company.

East Side:

On the 200x100 feet are various two and three story combination frame and brick buildings, occupied as saloons, lodgings, Chinese laundries, candy stores and lodgings.

Between Ankeny and Pine Streets.

West Side:

Southwest corner of Fourth and Ankeny is a 6-story brick building, 130x100 feet, occupied by Blake-McFall, Wholesale Paper house. (Now under construction.)

On the Northwest corner of Fourth and Pine Streets is a 7-story brick running 200 feet East and West and 75 feet North and South, occupied by Marshall-Wells Hardware Company.

East Side:

On the Southeast corner of Fourth and Ash Streets are two and three story frame buildings, occupied as blacksmith shop and lodgings. In the middle of the block is a 2-story brick building 175x40 feet, occupied

as stores on the ground floor, and lodgings on the second floor. In the center of the block is a circular building, 100 feet in diameter, 37 feet high, formerly occupied as the Battle of Gettysburg; now Brunswick-Balke.

Between Pine and Oak Streets.

West Side:

Southwest corner of Fourth and Pine and Northwest corner of Fourth and Oak is a 7-story Weinhardt Building, occupied by Wadhams & Company, M. Seller & Company and the Goodyear Rubber Co.

East Side:

Southeast corner of Fourth and Pine Streets is a 4-story frame building, 50x50 feet, occupied by Chinese, and a 2-story frame store building, 25x35 feet, also Chinese occupancy.

Northwest corner of Fourth and Oak Streets, is a 9-story Lewis building, concrete; under construction; 50x100 feet; 2-story frame building North adjoining.

Between Oak and Stark Streets.

West Side:

Southwest corner is a 6-story office building, 100 feet square, known as the Henry Building. Northwest corner of Fourth and Stark is 100x100 feet of 1 and 2-story frame buildings, occupied as stores, saloons, etc.

East Side:

Southeast corner of Fourth and Oak Streets is 11-story concrete Board of Trade Building.

Northeast corner of Fourth and Stark Streets is the 8-story stone and brick Chamber of Commerce Building.

Stark and Washington Streets.

West Side:

Southwest corner of Fourth and Stark Streets is a 2-story brick building, occupied by Pantages Theatre Building, with 2-story frame building South adjoining.

Northwest corner of Fourth and Washington Streets is a 7-story steel building, known as the Rothchild Building, 50x100 feet; North adjoining is the 8-story concrete building known as the Couch Building.

East Side:

Southeast corner of Fourth and Stark Streets is a 2-story brick building running 200 feet East and West, and 50 feet North and South; South adjoining is a 3-story brick, 50x100 feet. Stores on first floor, lodgings above.

Northeast corner of Fourth and Washington Streets is a 2-story frame 50x100 feet, occupied by stores on ground floor, lodgings above; adjoining is a 3-story brick, 50x100 feet, occupied by Blumauer-Hoch.

Between Washington and Alder Streets.

West Side:

Southwest corner, 5-story brick building, known as the Macleay Building, 50x100 feet, stores and offices; South, adjoining is a 4-story brick 75x100, occupied by Woodard-Clarke.

Northwest corner of Fourth and Alder Streets, various 2 and 3-story frame buildings, covering an area of 75x100 feet, occupied as saloons, stores and lodgings.

East Side:

Southeast corner of Fourth and Washington Streets, 2 5-story buildings, known as the Washington Building, 50x100 feet, occupied by stores and offices; adjoining South 3-story brick, occupied by Lipman & Wolfe, 100x75 feet.

Northeast corner of Fourth and Alder Streets, a 4-story brick building 100x100 feet, known as Hotel Belvedere.

Between Alder and Morrison Streets.

West Side:

Southwest corner of Fourth and Alder Streets, 4-story brick 100x100, occupied by Honeyman Hardware Company; South adjoining 2-story frame building, 50x100 occupied by Mace.

Northwest corner of Fourth and Morrison Streets, 3-story brick, 50x100 feet, occupied by stores and offices.

East Side:

The Southeast corner of Fourth and Alder Streets, a 5-story brick, known as Hoenstoffer Stores, 50x100 feet, stores and offices; South adjoining a 4-story brick building, 50x100, stores and offices. The Northeast corner of Fourth and Morrison Streets, a 3-story brick 100x100 feet, stores and offices. R. M. Gray.

Between Morrison and Yamhill Streets.

West Side:

Southwest corner of Fourth and Morrison Streets, a 2-story brick, occupied by Steinbach on ground floor, offices upstairs.

Northwest corner of Fourth and Yamhill Streets, $4\frac{1}{2}$ story building, formerly occupied by the Y. M. C. A., now stores and offices, area 100x75 feet; North adjoining is $4\frac{1}{2}$ story brick stores and offices.

East Side:

Southeast corner of Fourth and Morrison Streets, a 3-story brick, 100x100, Ben Selling and others on ground floor; offices and lodgings above; South adjoining is a 2-story brick, 50x100 feet, Portland Fire Department No. 1.

Northeast corner of Fourth and Yamhill, a 2 and 3-story frame, 50x100 feet, saloons and stores on the ground floor and Turner Hall above.

Between Yamhill and Taylor Streets.

West Side:

Southwest corner of Fourth and Yamhill Streets, 100x100 feet, 1 and 2-story frame buildings, occupied as stores below, lodgings above.

Northwest corner of Fourth and Taylor Streets, 100x100, are four frame buildings 1 and 2-stories high, one brick 1-story high, occupied as saloons, stores, black-smith shops, etc.

East Side:

Southeast corner of Fourth and Yamhill Streets, 100x75 feet, are one and 2-story frame buildings, occupied as stores; South adjoining, 50x100 feet, is a 4-story brick building, occupied by Winslow Rubber Company.

Northeast corner of Fourth and Taylor Streets are two frame buildings and one 1-story brick building, occupied by saloons and stores; 50x100.

Between Taylor and Salmon Streets.**West Side:**

Southwest corner of Fourth and Taylor Streets, on an area of 100x100 feet, are four frame buildings 1 and 2-story; South adjoining, 50x100 feet is 2½ story frame building, stores on ground floor, lodgings above.

Northwest corner Fourth and Salmon Streets, a 4-story combination brick and frame store building, 50x100 feet.

East Side:

On entire half block 200 feet North and 100 East and West are the various 1 and 2-story brick and frame buildings occupied as stores, saloons, on ground floor, lodgings above.

Between Salmon and Main Streets.**West Side:**

County Court House, 2-story and basement brick building.

East Side:

Plaza.

Between Main and Madison Streets.

West Side:

Southwest corner a 3-story Boarding House, 50x50 feet.

Northwest corner of Fourth and Madison Streets are two dwellings and one 1-story store building, all frame.

East Side:

Plaza.

Between Madison and Jefferson Streets.

West Side:

City Hall, being a 4-story and basement stone and brick building.

East Side:

Southeast corner of Fourth and Madison Streets, 50x100 feet, 2-story brick building, occupied as hotel; South adjoining, 2-story livery stable, 50x100 feet.

Northeast corner of Fourth and Jefferson Streets, on an area of 100x100 feet, four 2-story frame dwellings.

Between Jefferson and Columbia Streets.

West Side:

Southwest corner are two double dwellings, 2-stories high, each 50x50 feet.

On the Northwest corner is a 1 and 2-story lumber shed, 100x100 feet.

East Side:

On this half block are eight frame 1 and 2-story dwellings.

Between Columbia and Clay Streets.

West Side:

On the Southwest corner of Fourth and Columbia Streets are various 1-story frame buildings, occupied as tin-shop and marble works.

East Side:

On this half block are nine 1 and 2-story frame dwellings.

Between Clay and Market Streets.

West Side:

On the Southwest corner of Fourth and Clay Streets are five 2-story frame dwellings.

Northwest corner of Fourth and Market Streets is a lumber yard, occupying 100x100 feet.

East Side:

Southeast corner of Fourth and Clay Streets; on this 100 feet are five 1 and 2-story frame buildings.

Northeast corner of Fourth and Market Streets. On the corner is a 2-story frame lodging house, 90x75 feet; in rear is a 2-story brick hotel building.

Between Market and Mill Streets.

West Side:

St. Mary's Academy. Two 2-story frame buildings, one 3½ story brick adjoining and communicating.

East Side:

Southeast corner of Fourth and Market are five 1 and 2 story frame dwellings.

Northeast corner of Fourth and Mill Streets is a 2-story German Baptist Church, two and 1½ story dwellings adjoining.

Between Mill and Montgomery Streets.

West Side:

The Southwest corner of Fourth and Mill Streets is a 4-story brick, St. Michael's Church.

On the Northwest corner of Fourth and Montgomery Streets are three 1 and 2-story frame dwellings.

East Side:

On the Southeast corner of Fourth and Mill Streets are three 1½ story dwellings and one 2-story double flat.

Northeast corner of Fourth and Montgomery Streets, two 2-story frame building, Truck and Engine No. 4, latter being 50x100 feet.

Between Montgomery and Harrison Streets.

West Side:

Southwest corner of Fourth and Montgomery Streets

are two 2½-story frame flats; 2-story frame building in rear.

Northwest corner, 1½-story frame dwelling.

East Side:

On this half block are three double 2-story frame flats and three 2-story frame dwellings.

Between Harrison and Hall Streets.

West Side:

On this half block are two 2-story frame dwellings, and a 2½-story frame dwelling.

East Side:

On this half block are seven 2-story frame dwellings.

Between Hall and College Streets.

West Side:

In the center of the block, a 2-story dwelling.

East Side:

On this block are four 1-story frame dwellings and four 2-story frame dwellings.

Between College and Lincoln Streets.

West Side:

There is a double block 400 feet long, on which are 11 1-story frame dwellings and three 2-story frame dwellings.

East Side:

Also a double block, on which are two 2-story double flats and six 1 and 2-story frame dwellings.

Between Lincoln and Grant Streets.**West Side:**

On this block are five one and 2-story frame dwellings.

East Side:

On this half block are five 1 and 2-story frame dwellings.

Between Grant and Sherman Streets.**West Side:**

On this half block are five 1-story frame dwellings, and one 2-story store building 25x80 feet.

East Side:

On this half block are six 1 and 2-story frame dwellings, one 1-story building used as a carpet-cleaning establishment and one 2-story frame grocery and meat store.

Between Sherman and Caruthers Streets.**West Side:**

On this half block are eight 1 and 2-story frame dwellings.

East Side:

On this half block are four 1 and 2-story frame dwellings.

Between Caruthers and Sheridan Streets.**West Side:**

On this half block are six one and 2-story frame dwellings, one 2½ story frame flat building and one 1-story store building, occupied as a grocery.

East Side:

On this half block are four 1 and 2-story frame dwellings and one 1-story double dwelling; 2-story frame store building, occupied as butcher and grocery store, the latter being 50x50 feet.

Between Sheridan and Baker Streets.**West Side:**

The Southwest corner of Fourth and Sheridan Streets, 2-story frame store building, 50x50 feet, occupied as saloons and stores on ground floor; lodgings above. Also seven 1-story dwellings.

J. W. Curran testified that he lived on Fourth Street and that he had resided there twenty-five years, and, in answer to the question of whether or not the operation of the railroad on Fourth Street causes any discomfort and annoyance, said: "Oh, fearful, yes, sir,—very much. You cannot leave windows up at all. The bedding or the bed-clothes, the floors and carpets and nothing that is not covered with soot all the time, especially if the wind is blowing in that direction. I have been irritated and annoyed in different ways by my wife and daughter saying, 'Oh, what will we do with this thing going on.' 'When will we get rid of

this nuisance?' If you throw the windows up to air the house and happen to forget, if you hear the train you go at once, knowing the result; but if you forget, the place is covered with soot all the time. It would make anybody—." That globe after globe of gas fixtures had been destroyed by the vibration. Transcript of Record, page 326.

A. S. Brassfield stated that he had been for twenty-one years bookkeeper for A. B. Steinbach, who maintains a large gents furnishing store facing on said street. That in answer to the question of what the effect of the operation of steam locomotives and trains was on said business, said that the vibration of the trains affected the prisms set in the sidewalk to reflect light in the basement. That a customer being waited on by a salesman invariably has to stop conversation until the train passes. That it was impossible for them to use the new style Tungsten lights owing to the jar from the trains. That the windows are hard to keep clean on account of the smoke leaving a greasy effect thereon. Transcript of Record, page 388.

This is only a partial statement of the evidence, but in our opinion it is sufficient to show that ordinance No. 16491 was not an arbitrary exercise of the police power.

COMMENT ON PROPOSITIONS ADVANCED BY COUNSEL FOR APPELLANT.

Opposing counsel contend on page 71 of their brief that the ordinance is unreasonable because it prohibits the movement of freight trains and engines, and does

not offer any substitute motive power or confer any right upon the company to prosecute its business in any way upon said street; that the ordinance is not a regulation or limitation of the time or times when steam locomotives and freight trains may be prohibited.

Our answer to this contention is that the City has fixed a limitation of time when steam locomotives and freight trains might be operated on the street, namely, a year and a half from the approval of the ordinance.

As to motive power, the council prohibited only steam engines, leaving it to the railroad company to adopt electricity, gasoline or any other available power for its passenger trains, and a year and a half was provided for making the change so as to give the railroad company time to arrange for the new motive power, and for handling its freight in some other manner, either by erecting a freight depot in the southerly portion of the city or by making a connection with its East Side line (as the company then proposed doing, and has since in fact completed) and routing its freight that way.

Counsel complain on page 72 of their brief that Ordinance No. 16491 provides for a forfeiture and removal of the railroad in case of a violation of the ordinance.

In answer to this contention, we have only to refer to Section 5 of Ordinance No. 599, where it is provided as one of the conditions attached to the consent which the City gave in 1869, to use the street, that any refusal or neglect of the company to "comply with the provisions and requirements of this ordinance, or any other

ordinance passed in pursuance hereof shall be deemed a forfeiture of the rights and privileges herein granted." And it is further provided by Section 3 that the Council "reserve the right to make or alter regulations at any time as they may deem proper for the conduct of the said road within the limits of the City * * * and may restrict or prohibit the running of locomotives at such time, and in such manner as they may deem necessary."

It is apparent from these provisions that Counsels' objections apply not to Ordinance No. 16491, but to Ordinance No. 599 for it is Ordinance No. 599 which reserves the right to make further regulations and provides for a forfeiture in case of the violation of such regulations.

It is elementary that the railroad company cannot accept the beneficial portions of Ordinance No. 599, and repudiate those portions of the ordinance which were inserted for the protection of the City and the public.

On pages 74 to 77 of Counsels' brief, it is contended that Sections 6841 and 6842 of Lord's Oregon Laws gave the company the absolute right to locate and operate their railroad on Fourth Street, and that Ordinance No. 599 is of no effect.

The Court will see that such is not the case because Section 6842 provides that the railroad company shall locate its road upon such particular street as the local authorities shall designate, and if such authorities fail or refuse to designate the street within a reasonable time, such corporation may make such appropriation without reference thereto. The words "such appropria-

tion" refer to Section 6841 where it is provided that when it is necessary or convenient in the location of any railroad to appropriate any part of any public road or street, the County Court may, unless the same be within a municipal corporation, agree with the railroad company upon the extent, terms and conditions of the appropriation of said road or street, and if they are unable to agree, then the company may appropriate so much thereof as may be necessary and convenient in the location and construction of such railroad.

These sections must be construed most strongly against the railroad company for in such cases, nothing is presumed to be granted except what is stated in clear and exact language. Any doubt or ambiguity must be resolved against the company.

19 Cyc. 1459;

Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666;

O. R. & N. Co. v. Ore. Ry. Co., 130 U. S. 1, 26;

Mayor v. Farmers L. & T. Co., 143 Fed. 67, 71;

City v. Helena Water Works, 122 Fed. 1, 14;

Ore. v. Portland General Electric Co., 52 Ore. 343;

Joseph v. Joseph Water Co., 57 Ore. 586.

Keeping in mind the above principle of statutory construction, it is apparent that the railroad company had no right to construct its road upon Fourth Street except in the event of neglect or refusal of the City to designate what street the road should be located upon, and a showing that it was necessary and convenient to locate the road upon that street. Was that done? On

the contrary, it appears that the local authorities did designate the street, as is shown by Ordinance No. 599. The Council attached certain conditions to its consent, and this was proper as is shown by the citation from Judge Dillon on page 78 of Counsels' brief where it is said: "Although the statute or constitutional provision may simply require the consent of the municipality, it is usual to give that consent in the form of an ordinance containing stipulations and conditions, and such ordinance with its stipulations and conditions becomes a part of the contract under which the right to use the street arises."

It is therefore clear that although Section 6842 of Lord's Oregon Laws enables the railroad company to acquire the right to use some street in the City, the railroad company could not acquire that right except by complying with the terms of this statute, one of which terms was to submit to a designation by the City of the street which the railroad company might use. The City designated the street and attached to such designation certain conditions which it was warranted in doing and which the company accepted, and is bound to observe. The railroad company, therefore, cannot say that the condition relative to a forfeiture is not effective.

Counsel for the railroad company on page 99 of their brief contend that the City has no power to repeal, amend or modify Ordinance No. 599, and Section 6842 of Lord's Oregon Laws. We have already shown that by the present charter, the City has, within its limits, all of the police powers of the State, and that Ordinance No. 16491 was enacted pursuant to this power.

Counsel on page 105 of their brief contend that the Oregon Central Railroad Co. was empowered to assign the rights acquired under Ordinance No. 599 and Section 6842 of Lord's Oregon Laws. In our opinion, we have already shown that Ordinance No. 16491 is valid. It is therefore unnecessary to consider the question as to the assignability of the Oregon Central Railroad Company's rights. We will, however, attempt briefly to answer opposing counsel on this subject.

The law is settled in this state that where a right in the nature of a franchise is granted by legislative authority, which right is given for a public purpose, and the public is interested in its exercise, the same cannot be assigned without legislative authority.

In *Oregon v. P. G. E. Co.*, 52 Ore., at page 521, the Supreme Court of Oregon said:

"Again, as to the power of the first company to transfer its franchise, the grant was made to the first company with no power to transfer. Without such authority a transfer is void, and does not relieve the franchise of any of the burdens imposed by the act of its creation. These burdens are a charge upon the franchise, not upon the land as such, and may be enforced against the person or corporation exercising it:" *State v. Northern Pac. Ry. Co.*, 36 Minn. 207 (30 N. W. 663); *Railroad Co. v. Maryland*, 21 Wall. (U. S.) 456 (22 L. Ed. 678). This is the effect of the decision in *Lakin v. Railroad Co.*, 13 Ore. 436 (11 Pac. 68; 57 Am. Rep. 25), in which Mr. Justice Lord says: "A railroad corporation organized under it (the general law) has no authority, without the consent of the legislature, to lease its road, and that, when it has done so,

it is responsible to the public for the manner of operating the road. As to the public, those operating it must be regarded as agents of the corporation." Where a corporation "has granted to it by charter a franchise intended in large measure to be exercised for the public good the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." *Thomas v. Railroad Co.*, 101 U. S. 71, 83 (25 L. Ed. 950). In *Railroad Co. v. Winans*, 17 How. (U. S.) 30, 39 (15 L. Ed. 27), it is said: "This conclusion (argument) implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities of communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." In *Black v. Canal Co.*, 22 N. J. Eq. 130, 399, the court say: "It may be considered as settled that a corporation cannot lose or alien any franchise or any property necessary to perform its obligations and

duties to the State without legislative authority." See, also *Toll Road Co. v. People ex rel.* 22 Colo. 429 (45 Pac. 398; 37 L. R. A. 711); *Penn Co. v. St. Louis R.*, 188 U. S. 290 (6 Sup. Ct. 1094; 30 L. Ed. 83); *Chicago Gaslight Co. v. People's Gaslight Co.*, 121 Ill. 530 (13 N. E. 169); *Stewart's Appeal*, 56 Pa. 413. The right of a corporation to transfer its franchises was the only issue involved in *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1 (9 Sup. Ct. 409; 32 L. Ed. 837), under the general statute of 1862, the one involved here, and, after a thorough examination thereof, holds that it did not authorize a corporation to sell or lease its entire property, franchises, and powers to another company.

Counsel for defendant seem to claim something from the amendments of the act construed in that case: *Deady's Gen. Laws*, p. 659, c. 8, §5. Section 5 thereof (B. & C. Comp. §5056) was amended in 1878 (*Laws 1878*, p. 90, §1) by adding to subdivision 4 a clause giving a corporation power to receive and dispose of property donated to it for the purpose of aiding the objects of such corporation, but has no reference to the disposition of its franchises. This section was again amended in 1887 (*Laws 1887*, p. 14, §1) by adding subdivision 7, which relates only to railroads, and evidently for the purpose of avoiding the effect of the ruling in *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1 (9 Sup. Ct. 409; 32 L. Ed. 837), and also in recognition of the fact that at that time a corporation could not transfer its franchise, and neither of these amendments aid defendant here, and the act of 1905, authorizing corporations to transfer their property and franchise, can have no bearing upon this case."

Such is the case at bar, for the public was interested

in the maintenance and operation of the railroad in question. The company owed a public duty to operate its road, including that portion on Fourth Street, in accordance with the rights granted, and it could not discontinue the operation of such road without legislative authority, nor could it assign its rights and obligations without legislative authority. The reason for this is apparent, because if it had the power to assign its rights and obligations without legislative authority, it could terminate its duty to operate and maintain its road by making an assignment to an irresponsible company.

Counsel for the railroad company contend that Sections 5068 to 5070 of B. & Co.'s Code authorize a transfer of the Oregon Central Railroad Company's rights. A reading of these sections will show that they do not have that effect. These sections appear to apply generally to all corporations whether private business corporations, or quasi public corporations, such as railroads, but there is no express provision exempting railroad companies from the necessity of obtaining legislative consent for the transfer of their public rights. The provision authorizes a disposition of corporate assets upon a dissolution of the corporation, but was not intended to authorize a railroad company to make a disposition of its public rights without public consent, and in view of the principle of statutory construction above alluded to in our opinion it must be held that this provision of the statute authorizing a disposition of corporate assets upon dissolution does not abolish the common law rule requiring legislative consent for the transfer of public duties, but only authorizes a transfer of public rights upon legislative consent.

Counsel for the railroad company next contend that Section 106 of the present City Charter ratified and confirmed the alleged assignment from the Oregon & California Railroad Company. This section, however, cannot reasonably be given such construction. It merely provides that franchises theretofore granted should not be annulled or in anywise affected by the adoption of the new charter.

On page 112 of their brief, Counsel contend that Ordinance No. 16491 recognizes the validity of the alleged assignment by declaring it unlawful for the Oregon Central Railroad Company, its successors, assigns or lessees to run or operate steam locomotives or freight cars over, upon or along Fourth Street. Counsels' contention is not well founded, because Section 3 of the ordinance clearly indicates the legislative intent not to recognize the validity of any pretended assignment, for it is there provided that the ordinance shall not be construed so as to recognize assent to, confirm, ratify or extend any right, franchise or privilege.

Counsel assert that this latter provision is void on the ground that it is in conflict with affirmative provisions of the ordinance. Such, however, is not the fact, for the ordinance clearly shows the intent of the Council to prohibit any person or corporation from running engines and freight trains upon Fourth Street after the expiration of eighteen months from the adoption of the ordinance, and Section 3 is inserted for the express purpose of preventing such action from having any effect to acknowledge or confirm the validity of the pretended rights of appellant to occupy this street.

Counsel next contend that the City has ratified the alleged assignment, and is estopped to claim that appellant has no rights thereunder. The basis of this contention, as set forth on pages 129 to 131 of their brief, is that the City has required the Oregon & California Railroad Company to repave the street, and otherwise comply with the terms of Ordinance No. 599. The only evidence referred to in this connection is pages 426 to 429 of the transcript. This reference, however, fails to disclose any evidence which in our opinion supports Counsel's contention. The evidence referred to shows that in 1893, the City Council authorized the Oregon & California Railroad Company to lay a side track on Fourth Street to accommodate the Union Meat Company. It is doubtful from the evidence whether this side track is at all connected with the track on Fourth Street authorized by Ordinance No. 599. The side track begins ten feet north of the north line of Hoyt Street and runs westerly and southerly along Fourth Street, and twenty-three feet west of the center of Fourth Street to the north line of Glisan Street, whereas the railroad authorized by Ordinance No. 599 runs from the southerly line of the City along Fourth Street to the north line of G Street, which is now Glisan Street, and as much further north as said Fourth Street may extend or be extended. It does not appear whether Fourth Street extended, or has been extended to a point ten feet north of the north line of Hoyt Street, nor does it appear that the side track has any reference to the track on Fourth Street. We therefore fail to see how it can be contended that the adoption of this ordinance author-

izing a side track had any effect to ratify or confirm the alleged assignment by the Oregon Central Railroad Co. to the Oregon & California Railroad Co. Counsel fail to refer to any testimony where the City required the Oregon & California Railroad Company to improve the street occupied by the railroad, and if there was any evidence to that effect, it would not prove a ratification of the alleged assignment or estop the City from disputing the same, because it is a settled principle of law that any railroad company occupying a street is required to keep in good repair that portion of the street occupied by it, irrespective of any agreement so to do.

Reading v. Traction Co., 215 Pa. 250, 255;

Warster v. R. R. Co., 50 N. J. L. 203;

Ry. Co. v. Hoboken, 41 N. J. L. 71;

Ry. Co. v. State, 87 Tenn. 746;

Elliott on Roads and Streets, (2d ed. Sec. 1096a.

Any action of the City, therefore, was merely an enforcement of a common law obligation, and not a recognition of any pretended assignment.

Counsel for appellant next contend on pages 151 to 153 of their brief that the railroad on Fourth Street is a part of the road designated and required by the Congressional Act of 1870, and that the operation of this road as a commercial road necessarily includes the use of steam locomotives and freight trains.

A reference, however, to the act referend to shows that Counsels' contention is not true, because the act

does not require the road to be built on Fourth Street. Indeed, it makes no reference whatever to Fourth Street, or any other street in the City of Portland. It merely refers to a road from Portland to McMinnville. There is not a word of evidence tending to show that it was necessary to build a line on Fourth Street, in order to run from Portland to McMinnville. The road might have terminated in the southerly portion of the City or taken some other route through the City. Neither is it necessary to operate by means of steam locomotives. The Court will take judicial notice of the fact that electric engines are now available, and very largely used both for passenger and freight traffic on other roads of this character.

We also call the Court's particular attention to the fact that the Council in adopting Ordinance No. 16491 allowed ample time for appellant to install electric or gasoline motors for the operation of its passenger trains, and to construct the necessary branch for routing its freight trains through another portion of the City.

We submit that in view of the great annoyance, public delay and inconvenience occasioned by the operation of steam locomotives and freight trains on Fourth Street through the heart of the City, and the danger occasioned to life and property, the City Council has acted with a great deal of forbearance and consideration toward the railroad company in allowing as much time as a year and a half within which to make the necessary changes in order to comply with this ordinance.

It is next contended by Counsel for appellant that in

any event, the portion of Ordinance No. 16491 prohibiting the operation of freight trains on Fourth Street at any time during the day is unreasonable and void, and that this renders the entire ordinance void. Counsel would apparently have the Court believe that it is absolutely necessary to operate freight trains on Fourth Street. Such is by no means the fact. If it were a fact, which it is not, that the company had no means of delivering its freight into the City or to other railroads and steamships, except by operating its line on Fourth Street, it might be necessary for it to establish a freight depot in the southerly portion of the City and make the transfer by other conveyance rather than continue the operation of its freight trains through the heart of the City to the great inconvenience, annoyance and danger to the public.

The Court, however, will not presume that Fourth Street is the only place available to the company for operating freight trains. (Abstract of Record, page 404.)

Neither would the entire ordinance be void if that portion relating to freight trains were found invalid. The rule of statutory construction is that the remaining portions of a statute or ordinance will stand even if some parts thereof be found void, unless it shall appear that the void portion is so intimately and essentially connected with the remaining portion that the Court can say that the Legislature or Council would not have adopted the remaining portion of the statute or ordinance.

The ordinance in question is aimed at two separate and distinct things (1) the operation of steam locomotives, and (2) the operation of freight trains on Fourth Street. It cannot be said that the Legislature would not have prohibited the operation of locomotives if it had been advised that it could not prohibit the operation of freight trains.

We therefore submit, (1) that the ordinance prohibiting the operation of locomotives and freight trains cannot be declared void, even if the Court should disagree with the City Council as to its reasonableness, unless the Court should further find that the ordinance was not adopted as a police regulation, but was intended, and is a destruction of property under a mere pretense or guise of police regulation; (2) that the evidence in this case shows not only that the Council acted in good faith in the exercise of its police powers, but that its action in this matter was reasonable and, indeed, highly conservative and considerate of the railroad company's interest, and, in our opinion, even lax with respect to the interest of the public; (3) that in any event, Ordinance No. 599 and Section 6842 L. O. L. did not create a franchise right, but Section 6842 was merely an enabling act authorizing the construction of the railroad upon such street as the City might designate, and neither this act nor Ordinance No. 599 expressly authorized the operation of locomotives and freight trains. On the contrary, Ordinance No. 599 reserved the right to the City to adopt further regulations with reference to the use of such railroad, and this reservation was a reservation of police power which the City under its present charter could exercise without such reservation. (4) That the

Oregon & California Railroad Company, in whose shoes appellant stands, acquired no legislative consent to the pretended assignment of the rights given by Ordinance No. 599 and Section 6842 of Lord's Oregon Laws, and appellant, therefore, has no standing in Court to claim that a vested right has been impaired.

SUMMARY.

We, therefore, summarize our conclusions as follows:

FIRST: That Sections 6841 and 6842, Lord's Oregon Laws, granted a conditional license, and coupled with Ordinance No. 599 such rights are terminable at the election of either party.

SECOND: That the Oregon Central Railroad Company, incorporated as it was under the laws of Oregon and the reserved power of the Constitution, took its charter subject to the police power and that the subsequent enactments of the legislature conferring a charter on the City of Portland are applicable to that corporation.

THIRD: That Ordinance No. 599 does not constitute an irrevocable franchise or contract, but simply constitutes a conditional license which can be altered, impaired or modified.

FOURTH: That the Oregon Central Railroad Company, in its acceptance of the provisions of Ordinance No. 599 assumes the burdens imposed thereby and must

conform thereto, no matter how irksome such conditions may be.

FIFTH: That it is within the reasonable exercise of the police power of the City or State to prohibit the operation of steam locomotives on Fourth Street or the movement of freight traffic on such street, and that such a prohibition is a reasonable regulation either under the reserved power of Ordinance No. 599 or under the police power.

SIXTH: That the enactment of Ordinance No. 16491 is not an interference with interstate commerce.

SEVENTH: That the prohibiting of steam as a motive power does not deprive the complainant of the right to use other motive power.

EIGHTH: That whatever rights were given under Sections 6841 and 6842 and Ordinance No. 599, were not assignable, and such assignment was illegal and void and was not ratified by the State of Oregon or the City of Portland.

NINTH: That the Oregon Central Railroad Company, and its successors in interest, have no perpetual franchise or easement on Fourth Street.

TENTH: That Ordinance No. 16491 in no manner violates any obligation, if any was imposed, of the Oregon Central Railroad Company, and its successors, by the Act of Congress of May 4, 1870.

ELEVENTH: That Ordinance No. 16491 does not impair any vested property right of complainant, nor does it deprive it of its property without due process of law.

TWELFTH: That the evidence in the case discloses that the Council in the enactment of Ordinance No. 16491 showed considerable forbearance to the complainant,—gave it a reasonable time in which to employ modern motive power on Fourth Street and that such ordinance was not arbitrarily or capriciously enacted.

THIRTEENTH: That the evidence discloses the fact that complainant was building the Beaverton cut-off at the time the case was tried in order to take its freight traffic off of Fourth Street and the fact is, and we think it will be admitted by complainant, that it has obeyed Ordinance No. 16491 in that respect.

FOURTEENTH: That Sections 6841 and 6842 having been construed together by the Oregon Supreme Court, such construction should be adopted by this Court, and that the City had power in enacting Ordinance No. 599 to impose the conditions therein contained.

FIFTEENTH: That under any circumstances, the City could not contract away its police power to such an extent that it could not regulate the operation of a steam railroad on its streets when it became in fact a nuisance.

For these reasons, we most respectfully submit that the decree of the court below should be affirmed.

FRANK S. GRANT,
LYMAN E. LATOURETTE,
Counsel and Attorneys for Appellee. X

**SOUTHERN PACIFIC COMPANY v. CITY OF
PORTLAND.**

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.**

No. 122. Argued January 6, 1913.—Decided February 24, 1913.

Where, as in this case, a municipal ordinance, granting a franchise to use streets as authorized by the state law, expressly reserves to the city the power to make or alter regulations and to prohibit the use of a specified motive power, the grantee cannot accept it and afterwards claim that, as the state law only authorized the designation of streets, the municipality cannot exert the power reserved to prohibit the specified motive power without impairing the contract.

Although a municipality cannot defeat a grant made under authority of the State, it may under the police power reasonably regulate the method in which it shall be used; such regulations do not defeat the grant, if it is still practicable to operate under the new regulations. *Railroad Co. v. Richmond*, 96 U. S. 521.

The grantee of a franchise to use the streets coupled with conditions cannot avail of the benefits and deny the validity of the conditions, or claim that the exercise of the expressly reserved power is a violation of the contract clause of the Constitution.

Where under its reserved powers the municipality attempts to regulate a franchise to use the streets both as to nature of motive power and cars operated, the provisions are separable and do not stand or fall together. *Laclede Gas Co. v. Murphy*, 170 U. S. 99.

A franchise given by a municipality under state authority to a railroad to lay and operate tracks in a street includes the right to haul both passenger and freight cars, and a reserved power to regulate cannot be availed of to prohibit the hauling of freight cars and defeat the franchise given by the State and to that extent impair the contract under which the railroad was constructed.

While the power to regulate a franchise does not authorize a prohibition that destroys it, the municipality may legislate in the light of facts and conditions.

Whether subsequent regulations impair the obligation of a contract should only be determined on a complete record; and where, as in this case, all the conditions were not considered by the court of original jurisdiction the bill will be dismissed without prejudice.

The ordinance of Portland prohibiting the using of locomotives and hauling of freight cars on one of its streets occupied by a railroad under a franchise, *held* not to be an impairment of the contract as to the locomotives, but not decided on this record, whether it is an impairment as to the hauling of freight cars.

177 Fed. Rep. 958, affirmed.

APPEAL from a decree refusing to enjoin the City of Portland from enforcing an ordinance prohibiting the Southern Pacific Company from running steam locomotives or freight cars along Fourth Street.

It appeared that the Oregon Central R. R. was chartered to build a road from Portland to the California line. The company thereupon purchased a block of land in the city on which to locate its terminals and applied to the Council to designate the street on which the track should be laid. The general statute of the State then of force provided (Bellinger & Cotton's Code of Oregon, §§ 5077, 5078) that whenever a private corporation was authorized to appropriate any part of any public street within the limits of any town, such corporation should locate their road upon such particular street as the local authorities might designate. But if such local authorities refused to

make such designation within a reasonable time when requested, such corporation might make such appropriation without reference thereto.

The bill alleges that on January 6, 1869, "under and by virtue of the laws of the State and its charter then in effect," the City of Portland duly passed Ordinance 599, which provided that—

"SEC. 1. The Oregon Central Railroad Company, of Portland, Oregon, is hereby authorized and permitted to lay a railway track and run cars over the same along the center of Fourth Street, from the south boundary line of the City of Portland, to the north side of G Street, and as much further north as said Fourth Street may extend or be extended, upon the terms and conditions as hereinafter provided."

* * * * *

"SECTION 3. The Common Council reserve the right to make or to alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives within said limits, and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary."

* * * * *

"SECTION 5. It is hereby expressly provided that any refusal or neglect of the said Oregon Central Railroad Company to comply with the provisions and requirements of this ordinance, or any other ordinance passed in pursuance hereof, shall be deemed a forfeiture of the rights and privileges herein granted; and it shall be lawful for the Common Council to declare by ordinance, the forfeiture of the same, and to cause the said rails to be removed from said street."

The ordinance was accepted and the road was built from the terminals along Fourth to Sheridan Street, thence south over its private property and the right of way

granted by Congress (May 5, 1870, 16 Stat. 94, c. 69) to McMinnville. From its completion in 1871 to the present time freight and passenger cars drawn by steam locomotives have been constantly operated along Fourth Street. In 1903 the charter of the city of Portland was amended so as to authorize the granting of street franchises, and it is alleged that the city desired the railroad to take an electric franchise, paying therefor an annual sum. It is further charged that on May 1, 1907, over the protest of the Railroad Company, the Council passed Ordinance 16491, to go into effect eighteen months after date, by which it was made unlawful for the Oregon Central, its assigns, their lessees, or any other person to run or operate steam locomotives or freight cars along Fourth Street . . . between Glisan and the southerly limits of the city, excepting freight cars for the repair or maintenance of the railway lawfully and rightfully on said street. Violations were to be punished by fine or imprisonment and deemed a forfeiture of all rights claimed by the Oregon Central with respect to the operation of the railway on the street. On November 16, 1908, after the expiration of the eighteen months, a proceeding was instituted in the Municipal Court against the company and one of its agents, charging that he and it "did wilfully and unlawfully run and operate steam railway locomotives along Fourth Street" contrary to the provisions of Ordinance 16491.

The Southern Pacific, a Kentucky corporation, thereupon filed a bill in the United States Circuit Court, alleging that the Oregon Central's property had been transferred to the Oregon & California R. R. and that in 1887 the property and this street right had been leased to the Southern Pacific, which had since continuously operated freight and passenger cars with steam power over Fourth Street.

It averred that the railroad owned no other terminal

property than that purchased in 1869 and reached by the tracks on Fourth Street; that it was impossible to obtain any other terminal within the city accessible to the railroad from the intersection of Fourth and Sheridan Streets to the south boundary; that cars from Corvallis on its line running south could not be brought into the city and its business as a common carrier conducted if the ordinance was enforced, except by constructing, at an estimated cost of \$911,000, about 10 miles of road from Beaverton to Willsburg, thence across a bridge owned by the Oregon R. R. & N. Co., and thence by the southern terminus of said railroad constructed by the Oregon Central. The bill charged that the ordinance imposed excessive penalties and illegal forfeitures; that it was arbitrary, unreasonable and oppressive; deprived the company of property without due process of law; interfered with interstate commerce, and impaired the obligation of the contract under which the track had been laid in Fourth Street.

The city answered denying that the Southern Pacific owned the property and franchises of the Oregon Central, on the ground that the latter company had no charter-right to sell and also offered evidence to show that when in 1869 the tracks were first laid on Fourth Street, there were very few buildings thereon, while it was now one of the principal thoroughfares upon which many stores, hotels and public structures have been erected; it proved that the locomotives and cars were much heavier than those in use when Ordinance 599 was passed and the grade being steep, the puffing, blowing, exhaust, noise and jar caused by steam locomotives was more disturbing and injurious than where the line is more nearly level. It also proved that the Southern Pacific was then building a Cut-off or Belt Line, by which freight could be carried around the city instead of being hauled over Fourth Street.

The court held that under the police power, as well as

that reserved in Ordinance 599, the city could prohibit the use of steam and the hauling of freight cars, the ordinance not being arbitrary in view of the results of hauling locomotives and cars along Fourth Street, which he found was "quite steep, and the noise, vibration, smoke, cinders and soot from the moving steam locomotive and train seriously interfere with the transaction of public and private business, and are a constant source of danger and inconvenience to the public." He made no finding as to whether the company had other convenient and accessible means of reaching the terminal, for handling through and local freight. But having held that the city had power to pass Ordinance 16491, he dismissed the bill, and the carrier appealed.

Mr. James E. Fenton, with whom *Mr. Wm. D. Fenton*, *Mr. Ben C. Dey*, *Mr. Kenneth L. Fenton* and *Mr. Maxwell Evarts* were on the brief, for appellant:

The franchise or right granted the Oregon Central Railroad Company to appropriate and use the portion of Fourth Street designated in Ordinance No. 599, for the purpose of constructing and operating its railroad thereon, is a grant direct from the State and not from the city. *Dillon on Municipal Corporations*, 5th ed., §§ 1228, 1230, 1242, 1265-9.

This franchise was granted by the State of Oregon under the terms and provisions of §§ 24 and 25 of the act of the Legislative Assembly of the State of Oregon, passed October 14, 1862, which are now §§ 6841 and 6842 (*Lord's Oregon Laws*).

The grant by the State of this franchise or right to appropriate and use the part of Fourth street so designated by Ordinance No. 599 when it was accepted and acted upon by the railroad company and valuable improvements made and money expended on the faith thereof, became a contract between the State and the company which cannot

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Argument for Appellant.

be impaired either by law of the State or by an ordinance of the city. *Mayor of Knoxville v. Africa*, 77 Fed. Rep. 501; Dillon on Municipal Corporations, 5th ed., § 1242.

The franchise granted by the State of Oregon to the Oregon Central Railroad Company was one in perpetuity. *Louisville Trust Co. v. Cincinnati*, 76 Fed. Rep. 296; *Louisville v. Cumberland Tel. Co.*, 224 U. S. 649, 662; *Blair v. Chicago*, 201 U. S. 400; *Detroit Citizens' Street Ry. v. Detroit Ry.*, 171 U. S. 48; *St. Clair Turnpike County v. Illinois*, 96 U. S. 63; *Vilas v. Manila*, 220 U. S. 345; 3 Dillon Mun. Corp., §§ 1265-1269.

This franchise being a vested property right can be assigned, mortgaged or leased as other property. *Oregon Ry. & Navig. Co. v. Oregonian Ry. Co., Ltd.*, 130 U. S. 1.

Ordinance No. 16491 is not within any power reserved to the city by Ordinance No. 599; nor is it a reasonable or necessary exercise of any police power of the State or city regulating the use of the railroad on Fourth street with a view to the public welfare. *Railroad Co. v. Richmond*, 67 Virginia, 83; *S. C.*, 96 U. S. 521.

Ordinance No. 16491 is unreasonable and oppressive and as such operates to defeat the purposes of the grant from the State, and it is void in that—

It impairs the obligation of the contract under which the street was appropriated by the company and under which it located and operated its road thereon.

It deprives the company of its property—said franchise—without due process of law and denies it the equal protection of the laws.

Its enforcement will interfere with, restrain, and prevent the movement by the company of interstate commerce.

Even if it be conceded that the city could, under the police power, prohibit the use of steam locomotives on Fourth street, it could not, as it attempted to do under Ordinance No. 16491, deprive the company of its right,

under reasonable regulations, to move its freight trains at some time during the twenty-four hours. Such a prohibition is a taking of the property of complainant, under the guise of the exercise of the police power; it is not regulation, it is confiscation. *Wisconsin Tel. Co. v. Sheboygan*, 111 Wisconsin, 23, 36; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wisconsin, 32, 40; *Am. Un. Tel. Co. v. Harrison*, 31 N. J. Eq. 627; *Summit v. N. Y. & N. J. Tel. Co.*, 57 N. J. Eq. 123, 127; *New Hope Tel. Co. v. Concordia*, 106 Pac. Rep. 35; *Missouri Tel. Co. v. Mitchell*, 22 So. Dak. 191; *Michigan Tel. Co. v. Benton Harbor*, 121 Michigan, 512; *Telephone Co. v. St. Joseph*, 121 Michigan, 502, 506; *Jonesville v. Southern Michigan Tel. Co.*, 155 Michigan, 86; *Carthage v. Cent. N. Y. Tel. Co.*, 185 N. Y. 448; *Northwestern Tel. Exchange v. Minneapolis*, 81 Minnesota, 140; 3 Dillon on Mun. Corp., 5th ed., §§ 1230, 1269; *Street Ry. Co. v. Asheville*, 109 No. Car. 688; *Traction Co. v. Shreveport*, 122 Louisiana, 1.

If Ordinance No. 16491 be invalid in respect to the prohibition against the movement of freight traffic, then the entire ordinance is void. It is a fundamental rule that if part of an ordinance is void, another essential and connected part of the same is also void. *State v. Hoboken*, 38 N. J. L. 110; *United States v. Ju Toy*, 198 U. S. 253, 262; *Illinois Cent. R. Co. v. McKendree*, 203 U. S. 514, 529.

Mr. Frank S. Grant, with whom Mr. Lyman E. Lathurette was on the brief, for appellee:

The original ordinance, reserves to the city the right to make such rules and regulations, even to the extent of prohibiting the use of steam locomotives or freight cars on Fourth Street. *Railroad Co. v. Richmond*, 96 U. S. 521; *Buffalo &c. Ry. Co. v. Buffalo*, 5 Hill (N. Y.), 209; McQuillan on Ordinances, 2d ed., § 763; Nellis on St. Railways, § 46; *Pacific Railroad Co. v. Leavenworth*, Fed.

Cas. No. 10649; *Pac. &c. Ry. v. Hood*, 94 Fed. Rep. 618; *Railroad v. Bingham*, 87 Tennessee, 522; *Louisville T. Co. v. City*, 76 Fed. Rep. 296; S. C., 78 Fed. Rep. 307; 3 Dillon on Municipal Corporations, 5th ed., § 1229, p. 1952; *Clinton v. Worcester*, 199 Massachusetts, 279; *Rutherford v. Hudson R. T. Co.*, 73 N. J. L. 227; *McQuaid v. Portland Ry. Co.*, 18 Oregon, 248; Art. II, § 4, Const. Oregon.

The original ordinance was necessarily made and accepted subject to the city's right to the exercise of its police power. The power to make such regulations concerning the operation of the plaintiff's road as public safety and welfare might, from time to time, require cannot be contracted away. *Northern Pacific Railway v. Duluth*, 208 U. S. 583; *Joyce on Franchises*, § 138; *Ex parte Koehler*, 23 Fed. Rep. 529; *P. Ry. L. & P. Co. v. Railroad Commission*, 105 Pac. Rep. 713; Constitution Oregon, Art. II, § 2; *Fertilizing Co. v. Hyde Park*, 97 U. S. 663; *North Chicago &c. v. Lakeview*, 105 Illinois, 207; *Buffalo &c. Ry. Co. v. City of Buffalo*, 5 Hill (N. Y.), 209; *Brown v. City*, 47 Pa. St. 329; 2 Elliott on Roads, 3d ed., § 839; *Municipal Paving Co. v. Donovan*, 142 S. W. Rep. 644; *Macomb v. Jones*, 158 Ill. App. 271; *Hennington v. Georgia*, 163 U. S. 299; *Baltimore v. Baltimore T. Co.*, 166 U. S. 673; *Portland Ry. L. & P. Co. v. Portland*, Fed. Rep. (decided Nov. 1912, not reported); *Beer v. Massachusetts*, 97 U. S. 25; *Mugler v. Kansas*, 123 U. S. 623; *N. Y. & N. E. R. R. v. Bristol*, 151 U. S. 567; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 60; *Budd v. New York*, 143 U. S. 517; *C., B. & Q. R. R. v. Chicago*, 166 U. S. 226; *Detroit Railroad Co. v. Osborne*, 189 U. S. 383; *New Orleans Gas Light Co. v. Drainage Commissioners*, 197 U. S. 453; *C., B. & Q. R. R. Co. v. Illinois*, 200 U. S. 561; *Union Bridge Co. v. United States*, 204 U. S. 364; Cooley on Const. Lim., 7th ed., p. 400; 9 Enc. of U. S. Sup. Ct. Reports, 494; *Stone v. Mississippi*, 101 U. S. 814,

817; *Butchers' Union v. Crescent City Co.*, 111 U. S. 748; *Slaughter House Cases*, 16 Wall. 36, 62; *Boyd v. Alabama*, 94 U. S. 645; *Douglas v. Kentucky*, 168 U. S. 488; *Railway Co. v. People*, 201 U. S. 506; *Portland v. Cook*, 48 Oregon, 550, 555; *Portland v. Meyer*, 32 Oregon, 368, 371; *State v. Muller*, 48 Oregon, 252, 255; affirmed *Muller v. Oregon*, 208 U. S. 412; *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U. S. 1; *Providence Bank v. Billings*, 4 Pet. 514; *Railroad Comm. Cases*, 116 U. S. 307, 325; *Vicksburg S. & P. R. Co. v. Dennis*, 116 U. S. 665; *Water Co. v. Freeport*, 180 U. S. 587, 611; *Stanislaus Co. v. San Joaquin Canal Co.*, 192 U. S. 201; *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1; *Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385; *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 273.

The ordinance prohibiting the use of steam locomotives on Fourth Street does not deny the plaintiff in error the equal protection of the laws, although it alone is named in the ordinance, where no other person or corporation has the right to run engines in that street, as is the case at bar. *Richmond F. & P. R. Co. v. Richmond*, 96 U. S. 521.

The appropriate regulation of the use of property is not "taking it," within the meaning of the constitutional prohibition against the deprivation of property without due process of law. *Richmond F. & P. R. Co. v. Richmond*, 96 U. S. 521; *Pittsburg, C. & St. L. R. Co. v. Hood*, 36 C. C. A. 428; 94 Fed. Rep. 624.

The ordinance complained of, prohibiting the use of steam locomotives on Fourth Street, does not impair any vested rights of the plaintiff in error under its charter. *Richmond F. & P. R. Co. v. Richmond*, 96 U. S. 521.

The charter of the City of Portland in force when the ordinance was passed contains a provision giving the council power to exercise all the police powers to the same extent as the State could exercise said power within said limits. Under this power the council has authority to

regulate the running of railroad cars within the city limits and to prohibit their propulsion by steam. *Richmond F. & P. R. Co. v. Richmond*, 96 U. S. 521; *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill (N. Y.), 209; Dillon on Mun. Corp. (5th ed.), § 65.

Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances. McQuillin on Mun. Ord., 2d ed., § 731, p. 1586; *Greenaboro v. Ehrenreich*, 80 Alabama, 579; *Van Hook v. Selma*, 70 Alabama, 361; *Ex parte Delaney*, 43 California, 478; *Louisville v. Roupe*, 6 B. Mon. (Ky.) 591; *Spriggs v. Garrett Park*, 89 Maryland, 406; *Commonwealth v. Patch*, 97 Massachusetts, 221; *Lamar v. Weidman*, 57 Mo. App. 507; *Hannibal v. M. & K. Tel. Co.*, 31 Mo. App. 23; *Budd v. Camden*, 69 N. J. L. 193; *Union Oil Co. v. Portland*, 198 Fed. Rep. 441; *Dobbins v. Los Angeles*, 195 U. S. 223.

The legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence. McQuillan on Mun. Ord., 2d ed., § 731, p. 1587; *Union Oil Co. v. Portland*, 198 Fed. Rep. 441.

When a privilege or a franchise is granted containing the reserved power to alter, amend or repeal, whenever the public interest may require, no question as to the impairment of the obligation of the contract can arise when additional burdens are imposed. *Northern Pacific v. Duluth*, 208 U. S. 583; *Sioux City Street Ry. Co. v. Sioux City*, 138 U. S. 98; 1 Nellis on Street Railways, § 46.

A municipal corporation has no power to grant a franchise in perpetuity without express statutory authority from the legislature. *Joseph v. Water Co.*, 57 Oregon, 586; *Artesian Water Co. v. Boise City*, 123 Fed. Rep. 232; 186 Fed. Rep. 705; *Logansport Railway Co. v. City*, 114 Fed. Rep. 688; *Citizens' St. Ry. v. Detroit*, 171 U. S. 48; Nellis on Street Railways, § 46; 2 Elliott on Roads, § 1048; *Lake Rowland v. Baltimore*, 77 Maryland, 352; *Belleville v.*

Citizens' R. R. Co., 152 Illinois, 171; *McQuaid v. Portland Ry. Co.*, 18 Oregon, 237; *Water Co. v. Cedar Rapids*, 118 Iowa, 234; 28 Cyc. 655, 875; *Cooley's Const. Lim.*, 6th ed., 251; *Brenham v. Water Co.*, 67 Texas, 542; *Illinois Trust Co. v. Arkansas City Water Co.*, 76 Fed. Rep. 196; *Birmingham St. Ry. Co. v. Birmingham*, 79 Alabama, 472; *Water Works Co. v. Huron* (S. D.), 12 Am. R. R. & Corp. Rep. 398; *Water Company v. Westminster*, 98 Maryland, 551.

A contract beyond the power of the city is void *ab initio*. *State v. Minnesota Ry. Co.*, 80 Minnesota, 108; *Flynn v. Little Falls Elec. Co.*, 74 Minnesota, 180.

The city was vested with the right and power at the time ordinance 599 was passed to designate the street upon which the railroad could locate its road, and this right carried with it the power to impose reasonable conditions to such grant or permission which, when accepted by the grantee, became binding on it. *Pittsburg &c. Ry. Co. v. Hood*, 94 Fed. Rep. 618; *Southern Bell Tel. Co. v. Mobile*, 162 Fed. Rep. 523; *Mercantile Trust Co. v. Collins Park & B. R. Co.*, 101 Fed. Rep. 347; *Pacific Ry. Co. v. Leavenworth*, Fed. Cas. No. 10649; *Michigan Tel. Co. v. City*, 93 Fed. Rep. 11; *Pittsburg, C. & St. L. Ry. Co. v. Hood*, 94 Fed. Rep. 618.

Prohibition of steam power, under Ordinance No. 16491, does not prevent employment of electricity as a motive power. Booth on St. Railways, § 68, 2d ed.

The ordinance does not in any manner constitute an interference with interstate commerce. *Smith v. Alabama*, 121 U. S. 465.

Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances, subject to the supervision of the courts. 2 McQuillan on Ordinances, 2d ed., §§ 731, 732; *Union Oil Co. v. Portland*, 198 Fed. Rep. 441; *Holden v. Hardy*, 160 U. S. 366; *Dobbins v. Los Angeles*, 195 U. S. 223.

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Opinion of the Court.

Any doubt or ambiguity in the ordinances must be resolved against appellant. 19 Cyc. 1459; *O. R. & N. Co. v. Ore. Ry. Co.*, 130 U. S. 1, 26; *Mayor v. Farmers' L. & T. Co.*, 143 Fed. Rep. 67, 71; *City v. Helena W. Wks.*, 122 Fed. Rep. 1, 14; *Oregon v. Pac. Gen. Elec. Co.*, 52 Oregon, 343; *Joseph v. Water Co.*, 57 Oregon, 586; *Water Co. v. Freeport*, 180 U. S. 587; *Burns v. Multnomah Ry. Co.*, 15 Fed. Rep. 177.

A right granted in the nature of a franchise, to be exercised for a public purpose, cannot be assigned or leased without legislative authority. *Oregon v. P. G. E. Co.*, 52 Oregon, 521; *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.

MR. JUSTICE LAMAR delivered the opinion of the court.

The bill alleged that by virtue of the laws of the State and its charter the City of Portland passed Ordinance 599 permitting cars to be run along Fourth Street. That ordinance reserved the right "to make and alter regulations" and to "prohibit the running of locomotives." And as the court held that this reserve power authorized the city to prohibit the use of steam, the appellant,—though originally contending that Ordinance 599 was valid and constituted a contract which could not be impaired—now insists that under the law of force in 1869 the city could only "designate" the street on which tracks could be located and could not, by reservation, give itself power to prohibit the use of steam or the hauling of freight cars, nor could it provide for municipal forfeiture of a state franchise.

1. Under the Oregon Code (§§ 5077, 5078) the power to designate the street on which railroad tracks could be located was equivalent to the power to consent to the use of that street. The city was not limited to merely naming the thoroughfare or giving or refusing its consent. But—

provided they did not defeat the state franchise—could fix terms and reserve powers beyond those otherwise possessed by it as a municipality. The specific conditions and general powers reserved in § 3 of Ordinance 599 were not inconsistent with the grant from the State, and when, with such reservation, it was accepted by the company, it became contractual as well as legislative. The railroad could not rely on it for the purpose of laying the tracks and then deny the validity of such conditions. The Ordinance was proposed and accepted as an entire contract and, as such, was binding on the railroad as well as on the city. The power therein reserved "to make regulations" coupled with the right "to prohibit the running of locomotives at such time and in such manner as the city might deem necessary," authorized the city to prohibit the use of steam locomotives. This did not defeat the grant, inasmuch as it was permissible and practicable to use electricity, gasoline or other motive power free from noise and vibration—increased here above the ordinary when steam was used on a grade said to be one of the steepest, if not the steepest, in the State. The case is like *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, where, under a somewhat similar ordinance, it was held that the city might provide that no car or engine could be drawn or propelled by steam along certain parts of the highway.

2. The appellant insists, however, that even if the city can regulate the motive power, it cannot prohibit the hauling of freight cars, and that the invalidity of this provision and that forfeiting the franchise renders the whole Ordinance 16491 void. In reply it is contended that even if there were no other route than Fourth Street by which to reach the terminals, it might be necessary for the railroad to establish a freight depot in another part of the city and make transfers by other vehicles, rather than to continue to haul freight cars through Fourth Street:

but that, in any event, the "entire ordinance would not be void if that portion relating to freight trains were found to be invalid."

The provisions relating to motive power, prohibiting the hauling of freight cars and declaring a forfeiture for a violation of the ordinance are so far separable that they do not necessarily stand or fall together and, therefore, the regulation against the use of steam can be enforced without regard to the validity of the prohibition against hauling freight cars. *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 99.

3. Even if the city could have contracted for the right to revoke the State's franchise, the council did not attempt to reserve a power to repeal but only that it might make and alter regulations, and Ordinance 16491, whether treated as an exercise of the general police or special reserve power, recognized that the carrier might use electricity to haul passenger cars. There is nothing in that ordinance or in this record which indicates that there is any difference in result in the operation of the two classes of cars, or that the company has less right to haul one than the other. The lessee, and its assignors, as common carriers were charged with the duty of operating both, and Ordinance 599 in permitting a railway track to be laid in Fourth Street expressly authorized cars to be run thereon. Manifestly that gave the right to the company to transport freight as well as passengers. But if the city can prohibit the company from operating one set of cars it can prevent the use of the other, and under the power to regulate it could thus defeat the franchise granted by the State of Oregon and impair the contract under which the tracks were located and on the faith of which the terminals were constructed.

But while the power to regulate does not authorize the city to prohibit the use of the tracks in hauling freight cars, it may legislate in the light of facts and conditions

which would make restrictions reasonable and valid regulations. The extent of the power of the city and the rights of the company, however, ought not to be finally adjudicated on this record. For while the ordinance was attacked as a whole and there was some testimony that it would be possible to reach the terminals over other railways and by means of a Belt Line then being constructed for handling through freight, but not finished, yet the evidence was directed to the injurious consequences resulting from the use of steam and not from hauling cars. The bill was filed primarily to enjoin the city from prosecuting the company for running a steam locomotive. In sustaining the ordinance as a whole the court called attention to the fact that the street was quite steep throughout the business district, and the noise, vibration, cinders and soot from the moving steam locomotive and train seriously interfered with the transaction of business and were a source of danger and inconvenience to the public. But nothing appears to show that the noise or danger would be different in character or result from that caused by the running of other electric cars or that there was any reason why freight cars should be prohibited when passenger cars were permitted to be run. The city has the undoubted right to make regulations as to cars used in the transportation of local freight to and from the terminal. If, as claimed, the Belt Line, when completed, will afford convenient and accessible means of handling through cars without the necessity of going through Fourth Street, that fact may be given the weight to which it is entitled when regulations are made. But those issues were not clearly raised nor specifically ruled on by the lower court, and the city has neither attempted to prosecute for hauling freight cars nor attempted to enforce a forfeiture. These questions ought not to be determined here until such issues have been more definitely considered by the court of original jurisdiction. Without

prejudice to the right of either when such questions arise, the refusal to enjoin the prosecution for running a steam locomotive and the order entering a decree dismissing the bill must be

Affirmed.

MR. JUSTICE HUGHES and MR. JUSTICE PITNEY concur in the result.

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